IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-486

UNITED STATES STEEL CORPORATION, AND
YOUNGSTOWN SHEET AND TUBE COMPANY,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners United States Steel Corporation ("U. S. Steel") and Youngstown Sheet and Tube Company ("Youngstown") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 1, 1979.

ORDERS AND OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in Petitioners' Appendix ("Pet. App.") p. A1. The Orders of the United States Environmental Protection Agency ("USEPA") appear at 43 Fed. Reg. 8962 (March 3, 1979) and at 43 Fed. Reg. 45993 (October 5, 1978). Relevant portions of those Orders appear in Pet. App. pp. A21 and A34 respectively.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

The issues herein arise under the provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, and the Clean Air Act, 42 U. S. C. § 7401 *et seq*. The relevant portions of 5 U. S. C. §§ 553, 706; 42 U. S. C. §§ 7407, 7408, 7409, 7410, 7501, 7502, and 7607 are reproduced in the Appendix hereto at pp. A43-A74.

QUESTIONS PRESENTED.

In promulgating its designation of those areas of the country which had failed to attain the National Ambient Air Quality Standards promulgated under the Clean Air Act, USEPA dispensed with publication of proposed rulemaking and prior public comment and made the designations immediately effective. The Court of Appeals for the Seventh Circuit held that USEPA's action was justified under the "good cause" exemptions in 5 U. S. C. § 553(b)(B) and (d)(3) and that the limitations on the scope of judicial review of procedural defects in USEPA rulemaking contained in 42 U. S. C. § 7607(d)(9) were applicable, even though the activity under review was not one to which 42 U. S. C. § 7607(d) was made specifically applicable. The questions presented are:

Questions Supporting the Issuance of the Writ.

1. Whether the failure of USEPA to comply with the Administrative Procedure Act requirements for notice and comments prior to rulemaking was excused, contrary to decisions of the United States Court of Appeals for the Third and Fifth Circuits, by the "good cause" of statutory deadlines and self-imposed delay, where USEPA had by statute 60 days following submission to USEPA by the states of suggested designations to promulgate designations of the attainment status of various areas under the Clean Air Act.

2. Whether the limitations on judicial review of procedural defects in USEPA rulemaking set forth in 42 U. S. C. § 7607(d)(9) are applicable to rulemaking proceedings which Congress omitted from the enumeration in 42 U. S. C. § 7607(d)(1) of those proceedings to which the subsection applies.

Question to Be Urged Upon the Granting of the Writ.

3. Whether the designation of the northern portion of Lake County, Indiana as an area which had failed to attain the National Ambient Air Quality Standards for sulfur dioxide as of August 7, 1977, was arbitrary and capricious where such designation was based upon recorded violations of the standards at only one monitoring station and no air quality modeling had been performed using current emission levels of sulfur dioxide.

STATEMENT OF THE CASE.

The action below arose by a petition to review an order of the Administrator, USEPA, promulgated pursuant to Section 107(d) of the Clean Air Act, 42 U. S. C. § 7407(d). Jurisdiction in the Court of Appeals was founded upon 42 U. S. C. §7607(b) which provides for judicial review of final actions of the Administrator in the United States Courts of Appeal.

The 1977 Amendments to the Clean Air Act (P. L. 95-95, 91 Stat. 685 (August 7, 1977)), in new § 107(d), 42 U. S. C. § 7407(d) (Pet. App. pp. A46-A47) required USEPA to determine those areas not in compliance with the National Ambient Air Quality Standards as of August 7, 1977.[1] 42 U. S. C. § 7407(d)(1). Each State was to submit to USEPA, within one hundred twenty days of the passage of the 1977 Amendments, a list identifying the attainment status of all areas of the State. The deadline was December 5, 1977. Pursuant to 42 U. S. C. § 7407(d)(2), the Administrator was to promulgate each such list, within sixty days after submittal by the State, "with such modifications as he deems necessary." Pet. App. p. A47.

Pursuant to these requirements, the Indiana Air Pollution Control Division of the State Board of Health submitted a draft copy of Indiana's designations, indicating that a final version would be transmitted by December 5, 1977. Pet. App. p. A3. The designations as submitted listed the northern portion of Lake County, Indiana as a nonattainment area for sulfur dioxide. Pet. App. p. A4. Petitioner U. S. Steel operates a fully integrated steel mill, known as its Gary Works, located in Gary,

1. The background of events leading to the adoption of this provision is discussed in Part I of the opinion below, Pet. App. pp. A1-A4. It is also discussed in the opinions of the Third and Fifth Circuits which are reproduced at Pet. App. pp. A75-A84, and A85-A101 respectively.

Lake County, Indiana. Petitioner Youngstown Sheet and Tube Company operates a fully integrated steel mill, known as its Indiana Harbor Works, located in East Chicago, Lake County, Indiana. Both sources are located in the designated nonattainment area and necessarily emit sulfur dioxide in the process of producing steel.

On March 3, 1978, one month late, USEPA promulgated the designations of nonattainment for all areas of the country. 43 Fed. Reg. 8962. Pet. App. pp. A21-A33. This promulgation designated the northern portion of Lake County, Indiana, as nonattainment for sulfur dioxide. Pet. App. p. A32. The promulgation of March 3, 1978 was *not* one of proposed rulemaking. Rather, USEPA made the designations immediately applicable and effective, and solicited public comment by May 2, 1978. Pet. App. p. A21.

The effect of this action was twofold. First, it required the State to amend its implementation plan for sulfur dioxide in Lake County on a very tight schedule or face the potential loss of federal funds (42 U. S. C. § 7506) and a ban on construction of new sources in the area. (42 U. S. C. § 7410(a)(2)(I)). Second, it required that the USEPA "offset" policy (42 U. S. C. § 7502, n.) would be applied to new construction or modification of emission sources in the area.

USEPA justified its admitted failure to comply with the statutory requirements of 5 U. S. C. § 553 on the basis of "good cause." The "good cause" expressed in support of dispensing with notice of proposed rulemaking and prior opportunity for public comment was stated to be the need for immediate guidance to the States in their preparation of revisions to their implementation plans, and the tight statutory schedule. 43 Fed. Reg. at 8962, Pet. App. p. A23.

On May 1, 1978, U. S. Steel and Youngstown filed their separate Petitions for Review of this Order in the Court of Appeals below. On October 5, 1978, USEPA republished the attainment status designation at issue with one minor change not

relevant to the proceedings below. 43 Fed. Reg. 45995, Pet. App. pp. A34-A42.

During the course of the appeal below, USEPA filed two separate motions to consolidate the appeals of U. S. Steel and Youngstown Sheet & Tube. Both were denied. Nevertheless, when the separate appeals were set for oral argument, the court below, *sua sponte*, consolidated the appeals for purposes of oral argument.

On August 1, 1979 the Court of Appeals issued its consolidated opinion (Pet. App. p. 1) affirming the Order of USEPA at issue on three grounds. First, the court held that the agency had "good cause" to dispense with notice of proposed rulemaking and opportunity for prior public comment under 5 U. S. C. §§ 553(b)(B) and 553(d)(3). Second, the court held that it was precluded from reversing the agency decision by reason of the provisions of 42 U. S. C. § 7607(d)(9) which section "limits the circumstances in which rules promulgated by the EPA may be reversed for procedural errors." Pet. App. p. A5. Finally, as to the substantive issue the court held that the Order at issue was not arbitrary and capricious.

It is important to note that the issue of the applicability of 42 U. S. C. § 7607(d) was neither briefed nor argued before the court below. No questions from the bench during the course of oral argument raised this issue. The issue therefore arose for the first time as a result of the holding in the opinion below.

Petitioners did not file a motion for rehearing *en banc* below. Regarding the *sua sponte* application of 42 U. S. C. § 7607(d)(9), the court below, in footnote 14 to its opinion, (Pet. App. p. A15), noted the direct conflict between its decision and those of the Courts of Appeal for the Third and Fifth Circuits, and referred the reader back to footnote 11, the last sentence of which stated that the opinion "has been circulated among all judges of this Court in regular service. A majority did not favor a rehearing *en banc* on the question of this difference among circuits."

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH DECISIONS RENDERED UPON IDENTICAL FACTS BY THE UNITED STATES COURTS OF APPEAL FOR THE THIRD AND FIFTH CIRCUITS.

As noted above, the USEPA promulgation on March 3, 1978 at 43 Fed. Reg. 8962, Pet. App. p. A21 contained attainment status designations for all areas of the country. Numerous appeals in various circuits arose as a result of these designations (*See, e.g.* footnote 13 to the opinion below, Pet. App. p. A15). A common issue was the validity, under the Administrative Procedure Act ("APA"), of USEPA's action in dispensing with the requirements of notice of proposed rulemaking and opportunity for pre-promulgation public comment required under 5 U. S. C. §§ 553(b) and 553(c).

On April 25, 1979, in the consolidated cases of *Sharon Steel Corporation* v. *Environmental Protection Agency* and *Bethlehem Steel Corporation* v. *Environmental Protection Agency,* 597 F. 2d 377 (Pet. App. p. A75), the United States Court of Appeals for the Third Circuit entered an opinion reversing USEPA's promulgation insofar as it designated certain areas in Pennsylvania as nonattainment for particulate matter, and remanding the proceedings, holding that USEPA's action in dispensing with notice of proposed rulemaking and opportunity for public comment was in violation of 5 U. S. C. § 553 in that the agency's statement of "good cause" was insufficient under 5 U. S. C. §§ 553(b)(B) or (d)(3). Thereafter, on May 3, 1979, in the consolidated cases of *United States Steel Corporation* v. *United States Environmental Protection Agency* and *Republic Steel Corporation* v. *Environmental Protection Agency,* 595 F. 2d

207 (Pet. App. p. A85), the United States Court of Appeals for the Fifth Circuit also reversed and remanded USEPA's nonattainment designations, relating to certain areas in Alabama, for failure to comply with the APA requirements for notice of proposed rulemaking and opportunity for pre-promulgation public comment. In both cases, the courts declined to determine the substantive issues because of the remand on the procedural issue, and thus the specific facts of each case never reached consideration. Because the facts giving rise to the procedural issues were identical in each case, the decision of the Seventh Circuit is in direct conflict with those of the Third and Fifth Circuits.

The decision of the Seventh Circuit conflicts in principle with those of the Third and Fifth circuits in another important aspect. In the 1977 Amendments to the Clean Air Act, Congress added a new subsection (d) to Section 307. 42 U. S. C. § 7607(d), Pet. App. p. A46. This subsection sets forth provisions for administrative procedure and judicial review which are designed to be a substitute for the APA. *See,* 42 U. S. C. § 7607(d)(l)(N). Among these are provisions which require that all procedural objections be raised before the Agency (§ 7607(d)(7)(B)) and the requirement of the last sentence of § 7607(d)(8) which states that procedural errors, to be a ground for reversal, must be "so serious . . . that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." Pet. App. p. A73. Both of these requirements are incorporated into § 7607(d)(9) as prerequisites for reversal of any agency action based upon procedural defects.

However, the applicability of the procedural requirements and limitations of § 7607(d) is limited to those actions of USEPA specifically enumerated in § 7607(d)(1)(A)-(N). The promulgation of the designation at issue is not one of them. Indeed, pursuant to the first clause of § 7607(d)(1)(N), the Administrator could have made § 7607(d) applicable, but did not do so. Nevertheless, the court below held, *sua sponte,* that the limitations on review of procedural defects contained in

§ 7607(d)(9) were applicable to the Agency action under review. Pet. App. p. A14, noting that the contrary decisions of the Third and Fifth Circuits neither mentioned nor applied the special review provisions of § 7607(d)(9). Pet. App. p. A15, fn. 14. This conflict itself warrants the grant of certiorari.

II.

THE CONFLICT AMONG THE CIRCUITS RAISES ISSUES OF EXTREME AND IMMEDIATE IMPORTANCE TO ALL PERSONS SUBJECT TO USEPA RULEMAKING.

It is essential, to assure the public generally and affected parties a meaningful opportunity to participate in the rulemaking process, for this Court to resolve the conflict between the circuits on the "good cause" issue.

In addition, the action of the Seventh Circuit in applying 42 U. S. C. § 7607(d)(9) to the proceedings below, if allowed to stand, would render it impossible for persons who desire to participate in rulemaking proceedings under the Clean Air Act to know with certainty the rules which govern either the proceeding itself or any subsequent judicial review. It is now unclear, even under the Seventh Circuit's decision, whether USEPA rulemaking not enumerated under § 7607(d)(1) is governed by (a) the APA, (b) § 7607(d) of the Clean Air Act, or (c) some undetermined judicial hybrid of the two. However, if the opinion of the Seventh Circuit stands, it *is* clear that different procedures will apply in the Seventh Circuit than in the Third and Fifth Circuits, and unclear as to what procedures will apply in the remaining Circuits.

A. The Holding of the Seventh Circuit as to "Good Cause" Renders the Administrative Procedure Act and the Administrative Procedure Provisions of the Clean Air Act Ineffective as Procedural Safeguards to USEPA Rulemaking.

The Seventh Circuit opinion held that USEPA had "good cause" to dispense with notice and public comment because of

the tight statutory deadline imposed by the Clean Air Act,[2] and the need for immediate guidance to the States in the preparation of their revised Implementation Plans.[3] Pet. App. pp. A7-A9. First, it should be noted that USEPA, by promulgating the designation at issue on March 3, 1978 instead of February 3, had already missed the statutory deadline by a month. The urgency of the statutory deadline was largely self-inflicted since Indiana had submitted its list on or about the statutorily required date. Pet. App. p. A3.

However, the holding presents an ominous portent when viewed in the light of the Clean Air Act as a whole, and of USEPA's record thereunder. The Clean Air Act is replete with tight statutory deadlines applicable to USEPA, and the 1977 Amendments did nothing to cure this problem. It is a matter of public record that USEPA has had problems complying with these deadlines. By way of example, the Agency's most recent regulatory Agenda, published at 44 Fed. Reg. 33332-33342,

2. The Court apparently failed to consider the fact that USEPA could have unilaterally extended this deadline. Under § 7607(d)(1)(N), USEPA may make the provisions of § 7607(d) applicable to such other actions "as the Administrator may determine." In regard to actions to which § 7607(d) applies, USEPA may also extend any statutory deadline for promulgation of rules for up to six months under § 7607(d)(10). Thus USEPA could have published the Indiana designations as proposed rulemaking in December, 1977 or January, 1978 and extended the promulgation date to provide for adequate review.

3. USEPA and, apparently, the court felt that the States would benefit more by having the designations be immediately effective subject to possible revision following a sixty day period of public comment than by publishing the designations as proposed rulemaking to be made final following a thirty day period of public comment. Petitioners believe this is a distinction without a difference, a view shared by the Circuit Courts for the Third and Fifth Circuits. Pet. App. pp. A75, A85. Indeed, numerous changes were made following the public comment period. Pet. App. p. A15, n. 13. Certainly, little or no "immediate guidance" to the States resulted as to those areas the designations of which were revised in October, 1978. Pet. App. p. A15.

June 8, 1979, sets forth numerous examples of Agency inability to meet statutory deadlines.[4]

If the Agency is to be excused in the instant case from complying with the APA requirements of notice and public comment because of a tight statutory deadline, then it would appear that virtually any rulemaking could be subject to the Agency's dispensing with notice and public comment for "good cause." A widespread use of the "good cause" exemption could effectively eliminate public participation in USEPA rulemaking, not only under the Clean Air Act, but also under at least nine other statutes under which USEPA has rulemaking authority and which contain statutory deadlines. *See,* 43 Fed. Reg. 56158, November 30, 1978.

Even in those situations where § 7607(d) clearly applies to the rulemaking in question, the application of the "good cause"

4. Executive Order 12044, March 23, 1978, 43 Fed. Reg. 12661, 5 U. S. C. § 553, n., requires all agencies to adopt procedures to improve regulations, including the publication, twice a year, of a list of regulations in progress and their status. Pursuant to this Order, USEPA publishes an "Agenda of Regulations." The Agenda itself does not set forth the applicable deadline. However, reference to the sections of the Clean Air Act pursuant to which the regulations are being adopted reveals numerous overdue regulations. Some examples are:

a. Regulations regarding acceptable stack heights for credit under State Implementation Plans were to have been promulgated by January 4, 1978. 42 U. S. C. § 7423. The anticipated date is September, 1979. 44 Fed. Reg. 33334, June 8, 1979. (The State Implementation Plan revisions were required to be adopted by January 1, 1979. Pet. App. p. A7-A8)

b. The 1977 Amendments required USEPA to promulgate, by August 7, 1978, a list of categories of major stationary sources not yet controlled by New Source Performance Standards. 42 U. S. C. § 7411(f). As of the publication of the June 8, 1979 Agenda, this list was not expected to be promulgated until June, 1979. 44 Fed. Reg. at 33334.

c. The 1977 Amendments required USEPA to promulgate, by January 4, 1978, regulations establishing a noncompliance penalty program. 42 U. S. C. § 7420. These regulations were anticipated to have been promulgated in July, 1979. 44 Fed. Reg. 33334, June 8, 1979.

(Footnote continued on next page.)

exception would defeat the procedural safeguards in § 7607(d). Section 7607(d)(1)(N) states that subsection (d) of § 7607 "shall not apply in the case of any rule or circumstance referred to in paragraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code." 5 U. S. C. § 553(b)(B) sets forth one of the "good cause" exceptions relied upon by USEPA below and upheld by the court. Thus, in situations in which USEPA finds "good cause" to dispense with notice and public comment under 5 U. S. C. § 553(b)(B), neither the APA nor § 7607(d) of the Clean Air Act would apply.

The conflict created by the decision below and the decisions of the Third and Fifth Circuits presents an issue which will have an enormous impact on the administration of the Clean Air Act. It impacts the public, the Agency, those who are subject to its rulemaking, and the courts charged with reviewing its determinations.

B. The Decision of the Seventh Circuit Regarding the Applicability of 42 U. S. C. § 7607(d)(9) Causes Uncertainty in Pending and Future USEPA Rulemaking and Raises the Question of Whether the Administrative Procedure Act Applies to Any USEPA Rulemaking.

The decision of the Court below applied the limitations of § 7607(d)(9) without stating whether the basic procedural requirements of § 7607(d) also apply.

A careful review of § 7607(d) makes it clear that Congress intended that section to provide for a comprehensive set of procedural safeguards governing those rulemaking functions to which it applies. The procedural requirements set forth therein are much more detailed than those found in the APA. Section

(Footnote continued from preceding page.)

d. Regulations regarding State/local consultation were required to be promulgated by January 4, 1979. 42 U. S. C. § 7421. The anticipated date was June, 1979. 44 Fed. Reg. 33334, June 8, 1979.

7607(d) imposes more procedural duties upon the Agency than does the APA. Conversely, it requires the public and affected parties to be more diligent in the particularity of their comments. Viewed within this context, the limitations on the scope of judicial review of procedural defects found in § 7607(d)(9) make sense. There are many procedural requirements in § 7607(d) which will be unlikely to substantially affect the substantive merit of the rulemaking involved.

In contrast, the only procedural requirements in 5 U. S. C. § 553 are those relating to notice of proposed rulemaking and opportunity for a public comment period of at least thirty days. The limitations on the scope of judicial review of procedural defects in § 7607(d)(9) simply do not make sense when applied to proceedings under the APA.

Despite this, the court below, while recognizing that the rulemaking at issue was not one of those enumerated in § 7607(d)(1), held that the limitations on judicial review of procedural errors in § 7607(d)(9) applied "to all rulemaking by the EPA whether or not it is in the explicit categories covered by . . . section 7607(d)." Pet. App. p. A14. The court so held, without addressing the bulk of the § 7607(d) requirements and despite the introductory clause of § 7607(d)(9) which specifically limits the applicability of that subsection to actions of USEPA to which § 7607(d) applies. Pet. App. p. A73.

The decision below therefore either unmistakably amends the standard of review found in the APA at 5 U. S. C. § 706(2)(D), (Pet. App. p. A45) or requires that § 7607(d) be followed in all rulemaking. It would amend the APA by engrafting upon that standard the limitations on judicial review of procedural errors set forth in the Clean Air Act at 42 U. S. C. § 7607(d)(9). If this decision stands, the public is now faced with two Administrative Procedure Acts: one applicable to USEPA and a separate version applicable to all other agencies. The distinction is meaningful. While petitioners are cognizant of case law under the APA to the effect that

procedural defects which constitute "harmless error" do not call for a remand in all cases, the difference in proof required to show that an error was "harmful" and that required to show that an error was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made" (42 U. S. C. § 7607(d)(8)) is most significant. In addition, petitioners are aware of no requirement under the APA that all procedural objections must be raised below with reasonable specificity in order to be preserved on appeal, as is required under § 7607(d)(7)(B).

These questions are far from academic. USEPA is presently reviewing the revised implementation plans submitted by the States under the 1977 Amendments. Pursuant to 42 U. S. C. § 7410, USEPA may either approve or disapprove these revisions. The approval or disapproval of a State submitted implementation plan by USEPA is a rulemaking function *not* enumerated in § 7607(d)(1) and thus not subject to the procedures of § 7607(d). Such approval or disapproval is, however, directly appealable to the Circuit Court of Appeals under 42 U. S. C. § 7607(b). Thus it is critical that the proper procedures to be followed before the agency and the applicable standard of judicial review be known.

Under 5 U. S. C. § 553(b), USEPA should soon be publishing notice of proposed rulemaking with regard to these plans which will trigger a public comment period of not less than thirty days. 5 U. S. C. § 553(c) and (d). In the case of Indiana, USEPA, on August 14, 1979 at 44 Fed. Reg. 47559, published Notice of Receipt of the State's revisions to its plan, which notice promised that notice of proposed rulemaking and an opportunity for public comment would be forthcoming at a later date. Similar procedures will be followed regarding other States. Petitioners, and all other persons who will be subject to these revised plans, as well as the States and the interested public, should be able to ascertain what rules will govern their submis-

sion of comments. It is not enough to say that such is governed by the APA. Because of the existing conflict, that means something different to persons living in Pennsylvania and Alabama than it does to someone in Indiana. Petitioner U. S. Steel operates plants in the Third, Fifth and Seventh Circuits. Petitioner Youngstown, and its parent company, Jones & Laughlin Steel Company, operate plants in the Third and Seventh Circuits. The present conflict would require them, and others similarly situated, to operate under conflicting rules in what will be essentially identical procedural contexts. Petitioners also operate facilities in other circuits, including the Sixth, Eighth and Tenth. Persons in those circuits have no guidance at all as to which procedural rules will apply.

This issue, of course, goes beyond the USEPA's rulemaking regarding approval or disapproval of the revisions to the State plans. Numerous rulemaking efforts required of USEPA are omitted from the enumeration in § 7607(d). The conflicting procedural rules created by the Seventh Circuit decision below could cause chaos in rulemaking proceedings for years to come unless it is resolved expeditiously.

It is crucial to both USEPA and all who appear before it that there be a clear understanding of the governing rules. Certain important questions need answering. Is § 7607(d)(9) to be applied to rulemaking not enumerated in § 7607(d)(1)? If so are all the other procedural requirements of § 7607(d) to be applied so that § 7607(d)(9) is not applied out of context? Will USEPA be required to keep a docket, provide for oral presentation and transcripts, and hold the record open for thirty days after completion of the comment period (§ 7607(d)(5)) or be required to reopen the proceedings for comments on procedural defects which were not discoverable or did not arise until after the close of the public comment period (§ 7607 (d)(7)(B))? Would the provisions of § 7607(d)(10) which

permit USEPA, under certain conditions, to unilaterally extend statutory deadlines for rulemaking, be applicable to proceedings otherwise governed by the APA?

Petitioners strongly urge that the issue raised by the action of the Seventh Circuit in lifting § 7607(d)(9) out of context and applying it in such a way as to judicially amend the APA is one of national importance in the future administration of the Clean Air Act and deserves the attention of this Court.

III.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT BELOW WAS CLEARLY ERRONEOUS.

Petitioners' procedural challenges below were rejected on two grounds. First the court felt that USEPA had demonstrated "good cause" to dispense with notice of proposed rulemaking and prior public comment. Second, the court held that even in the absence of a sufficient showing of good cause, Congress intended the limitations on review of procedural errors in 42 U. S. C. § 7607(d)(9) "to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607(d)." Pet. App. p. A14.

The invocation of the "good cause" exemption in this case not only was not justified, but also caused counter-productive results. The list submitted to USEPA by Indiana was sent on or about December 5, 1977 (Pet. App. p. A3), the statutory deadline. The USEPA promulgation was not published until March 3, 1978. Pet. App. p. A21. Despite the statement that the designations were immediately effective, EPA also stated that it was "soliciting comments for 60 days and will publish revised designations as appropriate." Pet. App. p. A21. It is difficult to conceive of how this procedure could aid in meeting the statutory deadline, which had passed a month prior to promulgation, or in giving to the States "immediate guidance as to the attainment

status of the areas designated under section 107(d)." Pet. App. p. A23. All this told the States was that the designations were final for the time being. All of them were subject to revision following review of the public comments, and indeed a number were revised. Pet. App. p. A15, n. 13. There was therefore absolutely no "immediate guidance" gained by use of this procedure that would not have also been obtained had USEPA earlier published the designations as proposed rulemaking and made them final following the minimum 30 days public comment period required under 5 U. S. C. § 553(d). Pet. App. p. A44. Nothing was gained toward the "legislative requirements of expeditious promulgation." Pet. App. p. A9. What was lost was the right of interested persons to make their views known to the Agency prior to final rulemaking. Courts have historically been suspicious of attempts to provide for public comment only after interested parties are faced with a *fait accompli*. *See, City of New York* v. *Diamond*, 379 F. Supp. 503 (S. D. N. Y. 1974); *Kelly* v. *Department of Labor*, 339 F. Supp. 1095 (E. D. Cal. 1972).

Even more puzzling is the Seventh Circuit's application of 42 U. S. C. § 7607(d)(9). As discussed early, that subsection was adopted as merely one part of the overall scheme of administrative procedure set forth in § 7607(d). Nevertheless, if the opinion below stands, § 7607(d)(9) is applicable to all USEPA rulemaking under the Clean Air Act, despite the fact that by its own terms, it is not. The promulgation of the designations at issue under § 7407(d) is not one of the actions to which § 7607(d) is applicable, and USEPA did not choose it to be applicable under § 7607(d)(1)(N). Had Congress wished to make § 7607(d)(9) applicable to all USEPA rulemaking, it could have easily done so.

The court below ignored the plain language of the statute and relied on legislative history which indicated that Congress, in adopting § 7607(d)(9), intended to prevent rulemaking from "bogging down" in procedural arguments. Pet. App. p. A13.

However, those Congressional concerns were expressed in relation to the procedures required under § 7607(d), which as discussed previously, are much more detailed and demanding than the procedural requirements of the APA. Congress was thus explaining the inclusion of § 7607(d)(9) in § 7607(d). It was *not* considering the modification of the APA by § 7607(d)(9).

The clearly erroneous nature of the decision below warrants the grant of certiorari.

CONCLUSION.

This case presents issues clearly worthy of the Court's immediate consideration. Both the conflict between the circuits and the importance of the issues to future proceedings under the Clean Air Act support the need for prompt resolution. The alternative is procedural confusion which can give rise to needless litigation and delay in achieving the goals of the Clean Air Act. Petitioners therefore respectfully urge the Court to grant certiorari.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-1563 and 78-1564

UNITED STATES STEEL CORPORATION, and YOUNGSTOWN SHEET AND TUBE COMPANY,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petitions for Review of an Order from the
United States Environmental Protection Agency

ARGUED APRIL 18, 1979—Decided AUGUST 1, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This case arises from the Environmental Protection Agency's promulgation of a list designating those areas which do not meet national primary or secondary ambient air quality standards. The petitioners attack these designations on both substantive and procedural grounds. We find both claims to be without merit, and we uphold the agency's designations.

I

Under the Clean Air Act, 42 U. S. C. § 7401-7626, the Administrator of the EPA was required to promulgate national primary and secondary ambient air quality standards. 42 U. S. C. § 7409(a). The Administrator has promulgated these standards and they are codified at 40 C. F. R. § 50.1-50.11 (1978). After these standards were established, the states had a statutory responsibility to develop implementation plans to achieve these standards, *See* 42 U. S. C. § 7410. The Act required the state plans to provide for the attainment of these standards no later than 1975. However, in 1977 it became clear that these standards had not yet been achieved. Accordingly, Congress amended the Act to restructure the scheme for attaining these standards. Clean Air Act Amendments of 1977, P. L. 95-95, 91 Stat. 685 (August 7, 1977). These amendments pushed the primary standard compliance deadline forward to 1982. 42 U. S. C. § 7502(a)(1). Further, to insure that this deadline would be met, Congress established a new implementation process. This implementation process was to begin with a combined state and federal effort for the designation of those areas not in compliance with air quality standards. 42 U. S. C. § 7407(d)(1).[1] The designation of an area as "nonattainment"

1. The text of the provision is set out below:

List of noncomplying regions

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan

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imposes upon the state the obligation to include certain more stringent provisions in its implementation plan. 42 U. S. C. § 7502.

Under the scheme established by § 7407(d)(1), the states were required to submit to the EPA, within one hundred and twenty days after the passage of the Act, a list identifying the attainment status of all air quality control regions within the state. Pursuant to this requirement, Harry D. Williams, director of the Air Pollution Control Division of the Indiana State Board of Health submitted a draft copy of the state of Indiana's designations, indicating that a final copy would be sent on December 5, 1977, the statutory deadline. The final report designated por-

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attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection

tions of Northern Indiana in which petitioners operate steel works as nonattainment areas.

The EPA published its list of attainment designations, based on the state's submissions, on March 3, 1978. 43 Fed. Reg. 8962.[2] This list accepted the state of Indiana's designation of cerain portions of Northern Indiana as "nonattainment." Furthermore, the EPA indicated that although these designations were to be immediately effective, it was soliciting comments on these designations for 60 days. Comments were submitted by the petitioners in this case and by other interested parties, and on October 5, 1978, the EPA reaffirmed its designation of certain portions of Northern Indiana as nonattainment, although it did make alterations in designations with respect to other areas. 43 Fed. Reg. 46007.

II

Petitioners contend that the EPA's promulgation of these attainment designations violated the procedural requirements of 5 U. S. C. § 553 by not providing for notice and comment prior to the effective dates of the designations.[3] We reject this conten-

2. The statutory deadline for promulgating these designations was February 3, 1978. As mentioned later in the text, *infra* p. 9, this failure to meet the deadline may have been due in part to late submissions by states.

3. The threshold issue posed by this contention—*viz.*, that the designations constituted rulemaking—is not without difficulty, despite the Fifth Circuit's unanalyzed assertion that "the designations clearly come within the broad statutory definition." *United States Steel Corp.* v. *EPA*, No. 78-1922, at 7-8 (5th Cir., May 3, 1979). The Administrative Procedure Act defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U. S. C. § 551(4). Although the words "or particular applicability" perplexingly appear to expand this definition beyond useful perimeters, the legislative history demonstrates that these words were added late in the consideration of the act to prevent legislative-type promulgations from falling outside the definition of "rule" when they were directed to "named persons." S. Rep. No. 248, 79th Cong. 2d Sess. 283 n. 1 (1946); K. Davis, Administrative Law Treatise § 5.02, at 295-96 (1958). Thus, where a general statement of policy is directed to a group of multiple, but specified, parties, the statement is a rule.

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tion on two grounds. First, we hold that the agency had "good cause" to postpone the proceeding within the meaning of section 553's specific exemption. Second, we find that even if the agency lacked "good cause" within the terms of section 553, we are precluded from reversing by the Clean Air Act. The Act limits the circumstances in which rules promulgated by the EPA may be reversed for procedural errors.

A

Section 553(d) of the Administrative Procedure Act contains two "good cause" exceptions. The first, section 553(b)(B) provides that notice of, and public comment on, agency rules may be dispensed with "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest." The second, section 553(d)(3), provides that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date except . . . (3) as otherwise provided by the agency for good cause found and published with the rule." Accordingly, in a case such as the one before us where a regulation is made effective before notice and comment, the agency could rely on either "good cause" provision. Thus, the EPA made its attainment designations immediately effective, stating:

> The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110 (a)(2)(I) and 172 of the Act. This enterprise, which

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However, a designation, such as the one in this case, that applies solely to a specific, delimited situation is an entirely different matter. Indeed, the EPA's designation of areas as nonattainment is directly analogous to the Secretary of Transportation's designation of areas in public parks as necessary routes for the construction of highways, a function which the Supreme Court termed as "plainly not an exercise of a rulemaking function." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 414 (1971). Under this theory, the agency's designation of attainment areas would not be subject to the requirements of section 553. Since the agency, however, has termed these designations as rules, we need not reach this issue.

must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The agency's statement of "good cause" does not reveal on which of the two provisions the agency was relying. Although at least two commentators have suggested that the two provisions provide the same standard of good cause,[4] we believe that the standards are distinct and that the agency action, while justifiable under the (b)(B) standard, is unquestionably justifiable under the broader standard set out by (d)(3).

Turning first to whether the agency action here was justified under the narrower (b)(B) standard, we find that such justification existed under the impracticability standard embodied in the statutory language of the first good cause exception. The legislative history of this impracticability standard reveals that Congress intended this exemption to operate when the regular course of rulemaking procedure would interfere with the agency's ability to perform its functions within time constraints imposed by Congress. Early versions of this provision allowed public participation to be dropped where it was "impracticable because of unavoidable lack of time or other emergency." S. Doc. No. 248, 79th Cong., 2d Sess. 140, 148, 157 (1946). The exception was broadened by the elimination of this qualifying language. The Senate and House Reports interpreted "impracticable" in this broader formulation as a situation "in

4. *See* K. Davis, Administrative Law of the Seventies § 6.01-11 at 207 (1976); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540, 599-600 (1970).

which the due and required execution of the agency functions would be prevented by its undertaking public rule-making proceedings." *Id.* at 200, 258.

Two other courts have agreed that the "good cause" exception may be utilized to comply with the rigors of a tight statutory schedule. In *Clay Broadcasting Corp.* v. *United States*, 464 F. 2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom. National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336 (1974), the court held that the FCC had good cause to dispense with rulemaking before altering a license fee schedule since

> (1) wide-spread notice in fact would be provided affected parties; (2) a first of the month effective date was required for administrative pro-ration of yearly fees; and (3) that in accordance with Congressional directives the Commission wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible.

Id. at 1320. Likewise, in *Energy Reserves Group* v. *FEA*, 447 F. Supp. 1135 (D. Kan. 1978), the Court found that promulgation without rulemaking proceedings of regulations defining a congressional exemption to its oil price control scheme was justified under the "good cause" exemption. Congress required these regulations to be promulgated in 15 days, leading the court to find "good cause" to rely on "the legislative requirement of expeditious promulgation." *Id.* at 1150.

The legislative scheme involved in this case also confronted the EPA with a series of tight statutory deadlines. The EPA was given 60 days after the date on which states were required to provide lists of nonattainment areas to promulgate final designations of nonattainment areas. 42 U. S. C. § 7407(d)(2). More importantly, the states were required to have promulgated implementation plans for designated nonattainment areas by January 1, 1979. 42 U. S. C. § 7502 (annotation) [Pub. L. 85-85, § 129(c)]. These plans are to provide for attainment in these areas "as expeditiously as practicable . . . [but] not

later than December 31; 1982." 42 U. S. C. § 7502(a)(1). Furthermore, the development of these plans is a time-consuming process, requiring formal involvement by the public, local governments and state legislative bodies as well as the redevelopment of current emissions inventories. *Id.* at § 7502(b). These deadlines were a response to the failure of the states to meet prior attainment deadlines and represent Congressional concern over the seriously adverse health consequences of continued nonattainment.[5] H. Rep. No. 294, 95th Cong., 1st Sess. 207-211

5. Ironically, much of the Congressional concern over delays in meeting ambient air quality standards was directed at the failure of the petitioners in this case to reach compliance. The only specific example of nonattainment given by the House Report was contained in the following passage:

> The committee is also mindful of the fact that several categories of major polluters have not complied with emissions limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of non-compliance. In particular, the following testimony is of great concern:
>
> Mr. Rogers: Let's see, we have had the law 5 years now. Could you tell me company by company, how many of your plants are in compliance presently and how many are not?
>
> Mr. Armour [Interlake, Inc.]: I think we have to define in compliance with what.
>
> Mr. Rogers: The Clean Air Act?
>
> Mr. Armour: We do not have any in compliance.
>
> Mr. Anderson [Bethlehem Steel Corp.]: None.
>
> Mr. Jaicks [Inland Steel Co.]: None.
>
> Mr. Mallick [U. S. Steel Co.]: None.
>
> Mr. Tucker [National Steel Corp.]: We have no plants in compliance.
>
> Mr. Jaicks: It sounds terrible. But these are hard value money expenditures.

H. Rep. No. 294, 95th Cong., 1st Sess. 210-11 (1977). Given that the strict deadlines were intended to force compliance by U. S. Steel and others, we are hesitant to allow U. S. Steel to again delay compliance through its procedural challenges. We note that if we were to remand in this case, the entire deadline scheme would be thrown into complete disarray. State Implementation Plans, which were scheduled to be (and presumably were) formulated by January 1, would have to be further delayed while the EPA proceeded with yet another notice and comment period, and after promulgation of those designations states would have to repeat the hearing-consulta-

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(1977). Thus, the EPA was properly concerned that these explicit deadlines be met. This concern was magnified by the fact that some states, such as Wisconsin, were almost 2 months late in submitting their proposed designations. See *Oscar Mayer Co.* v. *Costle,* No. 78-1548 (7th Cir. 1978) (decided with this case). Since some of these designations had to be rejected by the EPA,[6] more time was required between the state submission and EPA publication. Adding one month for comment and four months to review and respond to these comments,[7] compliance with notice and comment procedures would have delayed promulgation by five months or more, leaving the states with less than 6 months to formulate implementation plans. Thus, given the "legislative requirement of expeditious promulgation,"[8]

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tion process in order to resubmit implementation plans. In the Fifth Circuit's remand of the rulemaking now before us, the court delayed the state deadline until nine months after the second "final" promulgation. This, of course, would (given four months to receive and evaluate comments) throw off the statutory scheme by almost two years. *See United States Steel Corp.* v. *EPA,* No. 78-1922 (5th Cir., May 3, 1979). Thus, remand in this case would permit U. S. Steel to continue the very procrastination which Congress sought to end.

6. For example, the state of Wisconsin's designation of Madison had to be altered. See *Oscar Mayer Co.* v. *Costle,* No. 78-1548 (7th Cir. 1978) (decided with this case).

7. This is the time that it actually took the EPA to review these comments. The Third Circuit in its computation of the time that pre-promulgation notice and comment would have required in this case allowed the EPA only ninety days to evaluate. *Sharon Steel Corp.* v. *EPA,* No. 78-1522 (3d Cir., April 25, 1979). We see no reason to adopt this apparent presumption that the EPA was dilatory or inefficient in reviewing the comments. As discussed further in note 14 *infra,* we believe that the Third Circuit ignored applicable law in its remand of the designations at issue in this case, and we have declined to adopt its reasoning or its result. *See* also note 11 *infra.*

8. Other cases finding that the agency had sufficient opportunity to meet deadlines and still supply prior comment opportunity are distinguishable in that they involved much longer time periods than the instant case. In *American Iron & Steel Institute* v. *EPA,* 568 F. 2d 284 (3d Cir. 1977), the EPA knew of its duty to promulgate regulations three years before the deadline. Likewise in *Consumer*

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the need for the states to begin promptly their own planning process,[9] and the continuing adverse impact on health that any further delays would entail,[10] we hold that the administrator

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Union of U. S., Inc. v. *Sawhill*, 393 F. Supp. 639 (D. D. C.), *aff'd*, 523 F. 2d 1404 (Emer. Ct. App. 1975) there was more than one year between passage of the act and the final deadline.

9. The need to supply information promptly to facilitate planning has been recognized by Congress as creating "good cause." A House Oversight Committee approved the Department of Agriculture's use of the exception to make last-minute changes in acreage allotments and marketing quota regulations without prior comment in order to facilitate farmers' planting decisions. Staff of House Comm. on Gov't Operations, 85th Cong., 1st Sess., survey and study of Administrative Organizations, Procedure and Practice in the Federal Agencies 26-27 (Comm. Print 1957), *as cited in Bonfield, supra* note 3, at 595.

10. The magnitude of this impact was set out in the most compelling terms by the House Report on the amendments:

> In one of these studies, the National Environmental Research Center (1974) evaluated the potential public health effects of increased emissions of sulfur oxides from steam electric powerplants, attributable largely to increased use of coal in the absence of sulfur oxide stack gas cleaning. Excess mortality and illness rates were calculated by obtaining a damage function for each of five health effects associated with sulfur oxide exposure. Damage functions were based upon published results from studies in 2 to 6 geographic areas per adverse health effect. Population size and exposure for each electric power region east of the Mississippi River were considered, and estimates of illness attributable to sulfur oxides were derived. A portion of the results is shown in the following table:

ESTIMATES OF ADVERSE HEALTH EFFECTS ATTRIBUTABLE TO SULFUR OXIDE EXPOSURES IN THE EASTERN UNITED STATES

Adverse health effects	Estimate of illness attributable to acid sulfates			
	Standards met		Standards not met	
	1975	1980	1975	1980
Million days of aggravated heart and lung disease.....	5.3	1.2	24.4	33.8
Increased number (millions) of asthma attacks.....	2.5	.8	8.8	11.5
Thousands of lower respiratory diseases in children.....	48.0	0	486.0	888.0

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had "good cause" to exempt these designations from § 553.[11]

Even if the EPA's actions here were not justified by the impracticability standard of the § 553(b)(B) exemption, we nonetheless hold that it had "good cause" within the meaning of 553(d)(3). We disagree that the phrase "good cause" should be interpreted similarly in both provisions. First, Congress intentionally added modifying language giving specific instances of good cause to 553(b)(B), *i.e.*, where notice and comment are "impracticable, unnecessary, or contrary to the public interest." That language is missing in (d)(3). Furthermore, since (d)(3) only dispenses with *prior* notice and comment, and not notice and comment although there is sound reason to believe that "good cause" should encompass more situations in (d)(3) than in (b)(B). Finally, the legislative history of (d)(3) shows that Congress considered a broader category of "good cause" for

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> As shown, nonattainment of air quality standards in a wide and densely populated region could result in a phenomenal health impact, measured in terms of millions of days of aggravated disease, asthma attacks and lower respiratory disease episodes. Obviously, these are only projections, not predictions, of the impact of increased sulfur oxide emissions in an area that is already heavily impacted with emission sources. (1977 House hearings, American Lung Association, pp. 3-4).

H. Rep. No. 294, 95th Cong., 1st Sess. 209 (1977). The Fifth Circuit in *United States Steel* v. *EPA*, No. 78-1922 (5th Cir., May 3, 1979), discussed and rejected at notes 11 & 14 *infra*, declined to apply the "good cause" exception in its review of the EPA rule under review here, holding that it was a "safety valve to be used where delay would do real harm" and citing as an example regulations designed to alleviate gas shortages and consequent violence at gas stations. See *Reeves* v. *Simon*, 507 F. 2d 455, 458-59 (Emer. Ct. App. 1974), *cert. denied*, 420 U. S. 991 (1975). We are at a loss to understand how gas shortages and fistfights constitute "real harm" whereas mortality and illness resulting from continued high levels of air pollution do not.

11. Of course, a remand at this point would intolerably delay the implementation of the statutory scheme and completely frustrate the Congressional purpose. For example, the Fifth Circuit in *United States Steel* v. *EPA*, No. 78-1922 (5th Cir. May 3, 1979), admitted that this remand would delay state implementation plans by more

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this exemption than those specified in the three instances set out in (b)(B). The House Report on the APA stated:

> Many rules . . . may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulations.

S. Doc. No. 248, 79th Cong., 2d Sess. 260 (1946). In particular, the reference to "demonstrable urgency" appears to permit findings of "good cause" in more situations than (b)(B) would permit, and certainly such urgency exists in this case where any delay in the EPA's designation would run the risk of delaying the formulation of state implementation plans and the consequent health detriment of delayed nonattainment.

B

Even if the agency's procedures here were not in technical compliance with § 553 of the APA, we would still not be able to reverse the Administrator's action in this case. We have al-

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than seven months. Slip op. at 14. This admission was somewhat conservative since the new time scheme dictated by the court to replace the Congressional scheme would have involved at least 13 months from the date of decision *not* counting the notice and comment period which we have suggested would add four to five more months. *See* text accompanying note 7 *supra*. Thus, the Fifth Circuit's remand will set back the schedule by almost two years behind the January 1, 1978 implementation date. Further, the Third Circuit's approach to this problem strikes us as unsound. Recognizing that the remand of the proceedings might "endanger the Congressional scheme for the control of air pollution," the Third Circuit attempted to resolve this difficulty by leaving the designations in effect except as to the two petitioners in the case before the court. *Sharon Steel Corp.* v. *EPA*, No. 78-1522, slip op. at 9 (3d Cir. April 25, 1979). If the rule is defective, however, we see no reason why anyone, whether they filed suit or not, should be subject to it. We, of course, have found the designation procedure valid and decline to follow the Third and Fifth Circuits. *See also* note 14 *infra*.

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ready noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as expeditiously as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities. As the House Report to the Amendments stated:

> Under the flexible procedures specified by the committee, disputed questions of classification may arise concerning, for example, whether a given question involves "facts" or "policy" or whether a given fact is "legislative" or "adjudicative." To prevent rulemaking from bogging down in arguments about such matters, and to underline that the agency is authorized to adopt rule-making procedures to the individual case, the committee has limited the extent to which the Administrator's decisions on such procedural matters may be reversed during judicial review.

H. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977).

Accordingly, the following limitations on review were enacted. Section 7607(d)(9) provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—
>
> . . . .
>
> (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) [that "only an objection to a . . . procedure which was raised . . . during the period for public comment . . ." may be raised during judicial review] has been met, and (iii) the condition of the last sentence of paragraph 8 [that the procedural errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors has not been made"] is met.

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This opinion has been circulated among all judges of this Court in regular service. A majority did not favor a rehearing in banc on the question of this difference among circuits.

Even if this rulemaking procedure is not one of those specified in subsection(d),[12] the legislative report's reference to the legislative-adjudicative distinction (a procedural issue which is not addressed in subsection (d) and which relates to the propriety of any rulemaking at all) suggests that Congress meant this limitation on review of procedural errors to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607(d). Thus, section 7607(e) provides:

> Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter [*i.e.*, the Clean Air Act of 1970], except as provided in this section.

Applying section 7607(d)(9) to the alleged procedural errors in this case, we find that none of the prerequisites for reversal have been satisfied. First, given the statutory time constraints and the delays that would be occasioned by prior notice and comment, we cannot say that it was arbitrary and capricious for the Administrator to postpone notice and comment until after the effective date. Second, we find no evidence in the record that the petitioners ever raised these procedural matters in the notice and comment period. The only issues raised by them during

12. Arguably these designations fit within the subsection's application to "the promulgation or revision of an implementation plan by the Administrator under section 7410(c) . . ." or to the "promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility)." 42 U. S. C. § 7607(d)(1)(B), (I). The designation of areas as "attainment" or "nonattainment" is an integral part of the promulgation of implementation plans and of regulations designed to prevent significant deterioration of air quality. See especially 42 U. S. C. § 7407(d)(1), stating that the designations are "[f]or the purpose of . . . part C of this subchapter (relating to prevention of significant deterioration of air quality)." Subchapter C, for example, (42 U. S. C. § 7470-91) sets out the provisions applicable to areas designated "attainment." 42 U. S. C. § 7471. Likewise, state implementation plans must have special provisions for nonattainment areas. 42 U. S. C. §§ 7501-08. Thus, no regulations with respect to implementation plans under subchapter C or subchapter D (§§ 7501-08) can be promulgated without these designations.

that period related to the substantive validity of the designations. Finally, we cannot say that the rule under review would have been any different if notice and comment had occurred before the effective date. It is important to realize that the rule under review here is the rule as finally promulgated in October 1978 and reflects many final changes made in the rule as a result of the EPA's consideration of submitted comments. *Compare* 43 Fed. Reg. 8963 (1978) *with* 43 Fed. Reg. 45988 (1978).[13] Given that the agency was clearly willing to consider, fully and objectively, all comments in the post-promulgation period, there is no reason to believe that its consideration of the comments would have been any different if completed before the effective date. Thus, we cannot make the required finding that the rule would have been different if the notice and comment period had occurred earlier.[14]

III

The petitioners also challenge the designation of the northern portion of Lake County, Indiana as "nonattainment," arguing that the failure of the designation to delimit an even smaller portion of Lake County as the only nonattainment area was arbitrary and capricious. The designation was based on the

13. Numerous pending challenges to the attainment designations were dropped as a result of the EPA's revision of the designations. *See Bethlehem Steel Co.* v. *EPA*, No. 78-1556 (7th Cir., Nov. 28, 1978); *Central Phosphate, Inc.* v. *Costle*, No. 78-1929 (5th Cir., October 16, 1978); *CF Chemicals, Inc.* v. *Costle*, No. 78-1931 (5th Cir., Oct. 16, 1978); *Occidental Oil Shale, Inc.* v. *EPA*, No. 78-1325 (10th Cir., October 6, 1978); *National Zinc Co.* v. *EPA*, No. 78-1327 (10th Cir., Oct. 6, 1978); *Gulf Oil Corp.* v. *EPA*, No. 78-1323 (10th Cir., Oct. 6, 1978); *Board of County Comm'rs* v. *EPA*, No. 78-1326 (10th Cir., Oct. 6, 1978).

14. The two cases reaching contrary results and remanding these designations to the EPA for notice and comment prior to effective issuance neither mention nor apply the special review provisions of section 7607(d)(9)(D). *Sharon Steel Corp.* v. *EPA*, No. 78-1522 (3d Cir., April 25, 1979); *United States Steel Corp.* v. *EPA*, No. 78-1922 (5th Cir., May 3, 1979). Since we believe this provision to be applicable and controlling, we reach a different result than these cases. See footnote 11 *supra*.

following data. First, violations of sulfur dioxide primary standards were monitored at the Hammond continuous monitor during April 1976 as well as April and May 1977. Second, "the results of short-term modeling studies carried out for various sources in the area using the 1974 emissions . . . [indicated] the potential of reaching some very high level values . . ." in the northern portion of Lake County. *See* Indiana Air Pollution Control Division, Proposed Nonattainment Areas in Indiana: A Support Document, IV-183 (1977) [Pet. Appendix at 56]. Since monitors only indicate air quality at the monitoring site alone, modeling studies are necessary to extrapolate from the monitor data to determine air quality throughout a larger region. The use of such studies to assess air quality throughout wide regions has been approved in *Cleveland Electric Illuminating Co.* v. *EPA*, 572 F. 2d 1150, 1160-64 (6th Cir.), *cert. denied*, ... U S. ..... (1978).

The petitioners forward three arguments as to why this factual basis is insufficient to support the designation under review. First, they point out that the modeling studies were based on 1974 data and did not take into account any emission reductions that may have occurred since then. Second, the petitioners rely on their own modeling studies. Petitioner Youngstown cites its own study, prepared by Arthur D. Little, Inc., as allegedly supporting the conclusion that the major contributors to this high monitor reading were two oil refineries near the Hammond monitor and that other sources in the area are not major contributors. Petitioner United States Steel likewise claims that its own study, prepared for it by Equitable Environmental Health, concludes that the days on which violations were recorded at the Hammond monitor were days on which the prevailing wind direction would preclude any impact by the petitioner's source and that on the days that the wind would have permitted such an impact, no violations were recorded. Finally, the petitioners cite the conclusion of a subsidiary EPA official that data for the Lake County area was insufficient and that, pending more extensive studies, only the area directly around the Hammond monitor should be designated nonattainment.

We do not find these arguments to be a persuasive basis for overturning the designations. First, the petitioners' argument that the modeling was based on outdated data is not compelling. Any strength that it might have could only be based on petitioners' assertion that improvements in emissions have been effected since 1974. There is, however, no support for this assertion in the record. Petitioners' comments on the proposed designations do not even make this assertion, much less provide any factual support for it. Indeed, the comments do not squarely raise the objection that the data is too old, and thus the petitioners are arguably precluded from raising this objection before this court. Finally, since the designation of an area as nonattainment triggers the requirement that the state engage in comprehensive current monitoring in order to define more precisely the attainment status of various regions, *see* 42 U. S. C. § 7502(b)(3), the use of three-year-old data to make this initial designation can hardly be said to be arbitrary or capricious.

Nor do we find that the petitioners' studies compel a different conclusion. The gist of these studies is that other sources were the principal contributors to the measured excesses. This argument assumes that the designation process is designed to define those areas in which the principal offending sources are contained. The statute does not expressly state the standards or methods by which areas are to be designated. Although one method would be to designate the areas containing the principal offenders as nonattainment, another approach would be to look simply at the expected air quality throughout a region and designate noncomplying areas, regardless of the origin of the noncompliance, as "nonattainment." The EPA has clearly adopted the latter approach. In its response to comments made before issuance of the final designations, the EPA stated:

> The purpose of the designations is to identify air quality problem areas for which the States and EPA must seek

solutions . . . . The area designation . . . thus does not in and by itself dictate the applicable new or existing source requirement. There are essentially three reasons for this.

First, because air pollution emissions are transported from one area to another, the sources that cause or contribute to a violation, or affect a clean locality, may be in different locations from the violation or clean locality itself. Controls will therefore often have to apply to sources outside of the area that the controls are intended to protect.

Second, States may choose to impose requirements over a broader or narrower geographic region than the precise area where sources exist that directly contribute to particular concentrations of a pollutant. For example, for reasons of equity, simplicity of administration, or to allow more growth in clear areas, *states may choose to make their revised emission limitations applicable statewide, rather than restricting the requirement to sources that directly cause or contribute to violations.*

Finally, section 107(d) of the Act provides that attainment status designations were to be made within a very short time period, and were to be composed of air quality control regions (or portions thereof), which are often based on State, county, or other political jurisdictional boundaries. This process is bound to include pockets where the air quality does not correspond to the designation of the area. These anomalies can be taken into account in the more elaborate and thorough proceedings required under the Act for development of plans and issuance of individual permits.

43 Fed. Reg. 40413 (Sept. 11, 1978) (emphasis added).

The EPA specifically used this approach with respect to the designation at issue here. In reply to comments on the Lake County designation, the EPA stated:

> Ten commenters requested revisions to the size of the sulfur dioxide (SO_2) primary nonattainment area in Lake County . . . . [E]ach commenter recommended that the city where the commenter was located be excluded from the nonattainment area . . . [because] most of the heavy industry in the area was not responsible for the violations which were monitored . . . .

> The northern portion of Lake County, Indiana, is heavily industrialized with a significant number of large SO_2 emission sources and relatively few continuous SO_2 monitors in operation. Despite the scarcity of the monitors, violations of the standard have been monitored. For this reason, the area must remain nonattainment for SO_2.

Clearly, therefore, the EPA treats the designation process as defining areas with problematic air quality and not merely pinpointing those areas which contain problematic sources. Since "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969), we must accept the EPA's interpretation of the designation process. Accordingly, the petitioners' contentions here that the problems of air quality found within Lake County may be traced to sources other than the petitioners and in a definable area are irrelevant to the designations adopted by the EPA. The monitored exceedances and the modeling studies demonstrated, and petitioners do not really contest, that the air quality in northern Lake County did not meet applicable standards, and that is sufficient to support the designations regardless of the source of the noncompliance.

The petitioners finally rely on the conclusion of an EPA employee to support their conclusion that a smaller area should have been designated nonattainment. Specifically petitioners cite a report by Gerald Regan, Chief of the Air Surveillance Branch for Region V of the EPA, made after reading the research study submitted by United States Steel discussed above and in which he recommended that the nonattainment designation be restricted to the "immediate vicinity" of the Hammond monitor. However, he also stated in this report that "it is probable that the primary SO_2 standard is being exceeded at locations other than the . . . [monitoring] site in Hammond." As we note above, those probable excesses are sufficient to support nonattainment designations, and thus any suggestion by Mr. Regan to limit the nonattainment area must be based on the theory, which

we have rejected, that the designation process is designed to pinpoint the principal offending sources. Therefore, nothing in this recommendation provides any reason to overturn the designations under review.

Accordingly, the petitions to set aside the § 7407(d) designations are denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

43 F. R. 8962

RULES AND REGULATIONS

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 856-5]

PART 81—AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

Section 107—Attainment Status Designations

Agency: Environmental Protection Agency.

Action: Final rule.

Summary: This rulemaking sets forth the attainment status of all States in relation to the national ambient air quality standards (NAAQS). The tables following this rulemaking indicate, on a State-by-State, pollutant-by-pollutant basis, the attainment status of every area as submitted by the appropriate State agency and approved, or as designated by the Environmental Protection Agency (EPA). No distinctions are made as to the severity of the violations recorded in the areas designated as nonattainment in these tables. These designations are immediately effective. EPA is soliciting comments for 60 days and will republish revised designations as appropriate.

Dates: Effective Date: Immediately. Comments Due: May 2, 1978.

Address: General comments on these designations should be addressed to Norman L. Dunfee, Chief, Control Programs Operations Branch (MD-15), Office of Air Quality Planning and Standards (OAQPS), Research Trangle Park, N. C. 27711.

Comments relative to specific State designations should be directed to the appropriate EPA Regional Office, contact as listed below:

Tom Devine, Chief, Air Branch, EPA Region I, JFK Federal Building, Boston, Mass. 02203 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont).

William Baker, Chief, Air Branch, EPA Region II, 26 Federal Plaza, New York, N. Y. 10007 (New York, New Jersey, Puerto Rico, Virgin Islands).

Howard Heim, Chief, Air Branch, EPA Region III, Curtis Building, Sixth and Walnut Streets, Philadelphia, Pa. 19106 (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia).

Tom Helms, Chief, Air Branch, EPA Region IV, 345 Courtland Street, NE., Atlanta, Ga. 30308 (Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina, Tennessee, South Carolina).

Jack Chicca, Chief, Air Branch, EPA Region V, 230 South Dearborn Street, Chicago, Ill. 60604 (Indiana, Illinois, Michigan, Minnesota, Ohio, Wisconsin).

Jack Divita, Chief, Air Branch, EPA Region VI, 1201 Elm Street, Dallas, Tex. 75270 (Arkansas, Louisiana, Oklahoma, New Mexico, Texas).

Art Spratlin, Chief, Air Branch, EPA Region VII, 1735 Baltimore Streets, Kansas City, Mo. 64108 (Nebraska, Iowa, Kansas, Missouri).

Robert DeSpain, Chief, Air Branch, EPA Region VIII, 1860 Lincoln Street, Denver, Colo. 80295 (Montana, Utah, North Dakota, South Dakota, Wyoming, Colorado).

Allyn Davis, Chief, Air Branch, EPA Region IX, 215 Fremont Street, San Francisco, Calif. 94105 (California, Nevada, Arizona, Hawaii, American Samoa, Northern Mariana Islands).

Clark Gaulding, Chief, Air Branch, EPA Region X, 1200 Sixth Avenue, Seattle, Wash. 98101 (Alaska, Washington, Oregon, Idaho).

FOR FURTHER INFORMATION CONTACT:

Norman L. Dunfee, USEPA, Research Triangle Park, N. C. 27711, phone 629-5226 (FTS) or 919-541-5226 (commercial).

SUPPLEMENTARY INFORMATION:

The Clear Air Act (CAA) Amendments of 1977 place additional requirements on the States and EPA. Among them, the Amendments added section 107(d), which directed each State, within 120 days after the Amendments were enacted, to submit to the Administrator a list of the NAAQS attainment status of all areas within the State. The Administrator was required under section 107(d)(2) to promulgate the State lists, with any necessary modifications, within 60 days of their submittal.

The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The Agency recognizes, however, the importance of public involvement in the designation process. It is therefore, soliciting public comment on this rule by May 2, 1978.

Comments received will be considered carefully and revisions to the designations will be made where appropriate. The criteria used in making these designations include the following.

Air Quality Data

Section 107(d) of the CAA specified that designations should be based upon air quality levels as of enactment of the Amend-

ments (August 7, 1977). States were required by EPA guidance to consider the most recent four quarters of monitored ambient air quality data available. If this data showed no standards violations, then the previous four quarters of monitoring data were to be examined to assure that the current indication of attainment was not the result of a single year's data reflecting unrepresentative meteorological conditions. In the absence of sufficient monitored air quality data, other evaluation methods were used, including air quality dispersion modeling.

Geographic Size

The Act specified that the designation areas could be based on air quality control regions (AQCRs) or any subportions of these areas. EPA advised States they could divide AQCRs into various nonattainment, attainment, or unclassified portions, i.e., county, subcounty, or other geographic areas as long as the area could be clearly defined in a written narrative. Additionally, a different geographic area could be used in designating the status for each pollutant.

Pollutant Specific Considerations

Subsections 107(d)(1) (A)-(E) of the CAA Amendments specified the possible categories for area designations. For both total suspended particulates (TSP) and sulfur dioxide (SO_2), an area could be designated as: (1) Not meeting the primary NAAQS, (2) not meeting the secondary NAAQS, (3) unclassifiable, and (4) attainment. For carbon monoxide (CO), photochemical O_x, and nitrogen dioxide (NO_2), designations of: (1) Not meeting primary NAAQS, and (2) attainment/unclassified were possible. The attainment and unclassified designations for $CO/O_x/NO_2$ are combined into one column for the tables presented in this notice because both designations are set forth by subsection 107(d)(1)(E) of the CAA. No designations regarding the secondary NAAQS for these pollutants were necessary

since the primary standards and secondary standards are identical.

The criteria used in designation of the status of each pollutant used in addition to ambient air quality data is discussed below:

Photochemical Oxidants

There are 105 urban areas in the United States with populations great[43 F.R. 8963]er than 200,000. The major urban areas (except Honolulu, Hawaii, and Spokane, Wash.) are where the oxidant problem is most severe. Honolulu has recorded eight consecutive quarters of data without a violations justifying and attainment designation. There is sufficient uncertaintly regarding conditions in Spokane to warrant an unclassifiable designation for the present time. The other 103 urban areas, where over 100,000,000 people reside, consistently experience photochemical oxidant levels above the NAAQS. Due to these factors, higher priority is being given in the SIP planning process to these urban areas. Of these, only six urban areas do not have oxidant ambient air quality monitoring data. The other 97 urban areas experienced oxidant violations based on ambient data. Since 97 of the 105 urban areas greater than 200,000 with monitoring data recorded violations, the six cities without data were presumed to be nonattainment for oxidants.

Additionally, a comprehensive analysis was performed by OAQPS and other factors considered by EPA for each of the six urban areas. These analyses substantiated the presumptive nonattainment designation and these areas will be required to monitor during the 1978 oxidant season (summer-fall) to determine the magnitude of their oxidant problem.

Total Suspended Particulates

Given the spatially limited nature of TSP violations, no general area size criteria were possible. However, States were advised that designations along political boundaries such as city

limits or county lines were practical from an air quality management standpoint.

The problem of designating for rural fugitive dust areas required special consideration. EPA's fugitive dust policy recognizes the generally greater health impact due to fugitive dust in urban areas in contrast to rural areas. In urban areas, the windblown soil contains various manmade toxic pollutants. But, rural windblown dust is usually not significantly contaminated by industrial pollutants. Therefore, for the purpose of these designations, any rural areas experiencing TSP violations which could be attributed to fugitive dust could claim attainment of the TSP NAAQS. Rural areas for this purpose are defined as those which have: (1) A lack of major industrial development or the absence of significant industrial particulate emissions, and (2) low urbanized population densities.

Carbon Monoxide

A designation of nonattainment for the entire urban core area of a city experiencing monitored CO violations was desirable, but smaller area designations were acceptable since CO violations are most pervasive in downtown areas of high traffic density.

Sulfur Dioxide and Nitrogen Dioxide

Generally where EPA promulgated a designation for SO_2 the minimum area was to be the county in which the violating monitoring site was located. If States had monitoring data to substantiate the size areas they designated, they would be acceptable by EPA regardless of size.

Air Quality Control Region (AQCR) Redesignations

Section 107 of the CAA also provided for redesignation of the existing AQCR boundaries where a State determined that the redesignated areas would promote more efficient air quality management. Several States exercised this option in defining

their designation areas. Part 81 under Title 40 of the Code of Federal Regulations presently contains descriptions of all existing AQCRs and these descriptions, where feasible, will be modified in a future Federal Register notice to reflect the State revisions. The exact descriptions of all AQCR boundaries are available from either the appropriate State or EPA Regional Office.

Effect of the Designations

Section 107(d)(1)(A)-(E) sets out attainment status categories to which reference is made in Parts C (Prevention of Significant Deterioration (PSD)) and D (Nonattainment) of the CAA. Section 171(2) in Part D defines "nonattainment area" to include any area identified under subparagraphs 107(d)(1)(A)-(C), while giving the Administrator authority to add other areas based on monitoring or calculations. Similarly, areas designated under subparagraphs 107(d)(1)(D) or (E) are described in section 161, Part C, as PSD areas.

The section 107(d) designations are meant to provide a starting point for States in their efforts to correct existing air quality problems and to implement programs under the 1977 CAA Amendments. For example, a designation as a nonattainment area, in general, means that an applicable SIP must be revised, pursuant to section 172, to provide for attainment of the NAAQS as expeditiously as practicable, but not later than December 31, 1982 (December 31, 1987, under certain conditions for photochemical oxidants and/or carbon monoxide). Under section 172(b)(6) the revised SIPs must require permits, in accordance with the provisions of section 173, for the construction and operation of major new or modified stationary sources. To be approved by the Administrator under section 110(a)(2)(I), a SIP must contain a prohibition against major new source construction in nonattainment areas after June 30, 1979, where emissions from the source would contribute to increases in pollutants for which a NAAQS was being exceeded, unless the SIP

meets the requirements of Part D at the time of the permit application. Under section 129 of the Amendments, EPA's emission offsets policy, as modified, continues to apply to major new source construction in nonattainment areas prior to July 1, 1979.

But the designation of an area as nonattainment or attainment must be considered only a point of departure and not a final, inflexible end in itself. The designations will have only limited significance for new source preconstruction review, for three reasons. First, new sources, wherever they proposed to locate, must be reviewed for their impact on all nearby areas as well as that in which they would locate. If an area on which a new source would impact is designated differently than the one in which it is locating, the designation of the latter would not necessarily determine the rules to which the source would be subject. Second, PSD rules apply in any area where at least one NAAQS is attained, and since virtually every area in the country shows attainment for at least one pollutant, the PSD review will be a requisite virtually everywhere. Finally, case-by-case new source review is necessitated to account for the possibility that an area with a particular designation may encompass "pockets" which do not fit that designation.

These section 107(d) designations are subject to revision under Section 107(d)(5) whenever sufficient data is available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence. EPA will promulgate any revised list in accordance with the requirements for this initial promulgation.

EPA Review

The State submittals were reviewed by EPA for consistency with the criteria set forth in this notice. Where EPA differed with a State designation, section 107 of the CAA provides that EPA should notify the State and allow the submission of additional information. If EPA and the state could not reach agree-

ment, an EPA designation would replace the State submitted designation. Also, in the case where a State failed to designate for any State or portion thereof the EPA would designate for the State as needed.

EPA considered all available monitoring data where it was determined to be valid. All EPA designations contained in the following tables were [43 F.R. 8964] made within the criteria contained in this notice except in a limited number of cases where the State designations were replaced by unclassifiable designations by the appropriate Regional Offices on the basis that a major source in each county was utilizing a possibly unauthorized dispersion technique. Since EPA has not finalized its tall stack policy regulations to implement Section 123, it is presently unknown whether the sources can claim full credit for their existing stacks.

EPA designations are indicated in the following tables by the asterisks accompanying the designations: * means a Federal EPA designation replaced a State recommendation. This * is used where either the designation status or the area size was modified by EPA: ** means solely a Federal designation where a State failed to submit their own recommendation. In some instances, the descriptions of the designated areas submitted by the States were so lengthy as to prohibit their publication in the limited space available in the tables presented below. Exact descriptions of all areas designated are available at the appropriate Regional Offices or the State in question. In some of the following tables, States reference AQCRs by their appropriate number instead of their title. An Appendix A is included in the regulatory section of this rulemaking which gives both the AQCR name and number for ease of reference.

A summary of the approved designations for the 3215 counties or county equivalents covered by these designations is presented below:

	TSP	SO_2	CO	O_x	NC_2
Number of counties either totally or partially approved or designated by EPA as nonattainment	421	101	190	607	8

Dated: February 23, 1978.

DOUGLAS M. COSTLE,
Administrator.

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended by adding Subpart C and Appendix A as follows:

Subpart C—Section 107 Attainment Status Designations

AUTHORITY: Secs. 107, 301 of the Clean Air Act, as amended (42 U. S. C. 7407, 7601).

Subpart C—Section 107 Attainment Status Designations

§ 81.300 Scope.

Attainment status designations as approved or designated by the Environmental Protection Agency (EPA) pursuant to Section 107 of the Act are listed in this subpart. Area designations are subject to revision whenever sufficient data becomes available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence.

[43 F.R. 8992]

§ 81.315 Indiana.

INDIANA — SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Dearborn County			X	
Gibson County			X*	
Jefferson County			X*	
Lake County				
An area bounded by Lake Michigan on the north, the Indiana-Illinois State line on the west, U.S. 30 on the south, and the Lake-Porter County line on the east.	X			
The remainder of Lake Co.				X
LaPorte County				
An area bound in the north by Lake Michigan & the Indiana-Michigan State line, in the west by the LaPorte Porter County Line, & in the south & east by I-94	X	X		
The remainder of LaPorte County				X
Marion County	X	X		

X* EPA designations replace State designations

INDIANA — SO_2 Continued

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Porter County				
An area bound in the north by Lake Michigan, in the west by the Lake-Porter Co. line, in the south by I-80-90 & in the east by the LaPorte-Porter County line	X	X		
The remainder of Porter Co.				X
Vigo County	X			
Warrick County			X*	
Wayne County	X			
All portions of all other Indiana Counties				X

X* EPA designations replace State designations

[43 F.R. 45993]

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Subchapter C—Air Programs

[FRL 972-2]

PART 81—AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rulemaking responds to comments and makes necessary amendments to the designations of attainment status relative to the national ambient air quality standards (NAAQS) for Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. This rulemaking supplements the national EPA rulemaking of September 11, 1978 (43 FR 40412), and incorporates by reference EPA's position on certain general issues raised in comments on the designations found in the supplementary information section of that rulemaking.

DATE: Effective date—October 5, 1978.

FOR FURTHER INFORMATION CONTACT:

Thomas Mateer, Air Programs Branch, U. S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Ill. 60604, 312-353-2334.

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1977 (the 1977 Amendments), Pub. L. 95-95, added section 107(d) to the Clean Air Act (the Act) which directed each State to submit to the Administration a list of the NAAQS attainment status of all areas within the State. The Administrator was required under section 107(d)(2) to promul-

gate the State lists, with any necessary modifications. For each standard, areas are classified as either not meeting the standard (nonattainment areas), meeting the standard (attainment areas), or lacking sufficient data to be classified (unclassifiable areas). The U. S. Environmental Protection Agency (EPA or the Agency) published these lists in the FEDERAL REGISTER on March 3, 1978 (43 FR 8962), and invited the public to submit comments to the Agency by May 2, 1978.

Certain issues raised in these comments were similar to those raised by others throughout the nation. These issues are addressed in the national EPA promulgation. Additional issues which are specific to the States in EPA region V are addressed in this action. Several of the comments have caused EPA to modify earlier designations. In some cases, the designation has been changed by redefining the boundaries of the area; in others, the designation itself has been changed but no new nonattainment areas have been designated in counties which were previously attainment or unclassifiable.

For good cause, the amendments to designations made final today are being made effective immediately. As discussed in the national EPA rule-making, the only effect of these designations is to identify problem areas for which State planning must be completed by a statutory deadline. These designations impose no obligation on any source. There would therefore be no point in deferring the effective date. The issues raised in the comments are discussed below by State.

* * *

[43 F.R. 45994]

INDIANA

The Agency received a total of 24 comments on designations in the State of Indiana. Also, the State of Indiana on June 12, 1978, petitioned the Agency under section 107(d)(5) of the Clean Air Act to revise the designations for several counties, in some cases revising its previous recommendations. Normally,

the Agency's approval or disapproval of such a petition would be proposed as rulemaking and subsequently promulgated; however, since Indiana's petition was submitted in time to be reviewed along with all of the other comments on designations and since there is no prejudice to sources in areas where the designation is revised, the State's recommendations in the petition were reviewed and are discussed below in conjunction with all other comments on the same areas.

* * *

[43 F.R. 45995]

SULFUR DIOXIDE (SO_2)

Ten commenters requested revisions to the size of the sulfur dioxide (SO_2) primary nonattainment area in Lake County. With the exception of the State of Indiana, each commenter recommended that the city where the commenter was located be excluded from the nonattainment area, for the following reasons: Relatively few monitors within the area registered violation of the SO_2 national ambient air quality standards (NAAQS) and most of the heavy industry in the area was not responsible for the violations which were monitored. Commenters generally believed that sources unfairly placed within the nonattainment area would suffer potentially serious adverse impacts due to restrictions on economic growth and unnecessarily restrictive emission limitations.

The northern portion of Lake County, Ind., is heavily industrialized with a significant number of large SO_2 emission sources and relatively few continuous SO_2 monitors in operation. Despite the scarcity of the monitors, violations of the standard have been monitored. For this reason, the area must remain in nonattainment area for SO_2. Also, the impact of the designation need not be adverse to emission sources not causing or contributing to violations of the standard as explained in more detail in the national EPA rulemaking.

The State of Indiana comment recommended redescription of the southern boundary of the Lake County non-attainment area (currently U. S. 30 between the Illinois State line and the Porter County line) to U. S. 30 east from the Illinois State line to the intersection of U. S. 30 and I-65, north along I-65 to the intersection of I-65 and I-94, and east along I-94 to the Porter County line. The area recommended by the State of Indiana encompasses all significant emission sources and is therefore acceptable. The southern boundary of the Lake County nonattainment area for SO_2 is revised as noted above.

Two commentors recommended that the designation for Porter County be changed from partial nonattainment for SO_2 to attainment for the full county. The State of Indiana recommended that the nonattainment area (the area bounded by Lake Michigan on the north, by the Lake-Porter County line on the west, by I-80-90 on the south, and by the La Porte-Porter County line on the east) be redesignated as unclassifiable. On June 12, 1978, the State of Indiana petitioned EPA under 107(d)(5) of the Clean Air Act, to revise the Porter County designation from attainment in part to attainment for the entire county. In all cases commenters noted that the original designation was based on computer dispersion modeling utilizing the urban version of the RAM model, rather than on monitored violations of the SO_2 air quality standards. All commenters indicated that the rural version of the RAM model would be more appropriate for use in Porter County.

Upon evaluation, EPA concurred in that assessment and the Indiana Division of Air Pollution Control remodeled Porter County untilizing the rural [43 F.R. 45996] version of RAM. While the results of the rural RAM model showed no predicted violations of the primary or secondary NAAQS for SO_2 EPA noted certain technical deficiencies in the modeling. The modeling performed by Indiana did not utilize maximum allowable emission rates in determining whether there would be attainment

of the 3-hour and 24-hour SO_2 standards, and background concentrations of SO_2 were not adequately considered. For the above reasons, we cannot concur that the State's rural RAM modeling of Porter County demonstrates attainment of the SO_2 NAAQS, however, that portion of Porter County designated as nonattainment in the March 3 promulgation will be redesignated as unclassifiable. The remainder of Porter County will remain attainment.

One commenter recommended that the portion of La Porte County designated as primary and secondary nonattainment for sulfur dioxide be reclassified as attainment. The State of Indiana recommended that Center, Scipio, Kankakee, New Durham, and Pleasant Townships and the area north and west of I-94 be redesignated as unclassifiable. On June 12, 1978, the State of Indiana formally petitioned under 107(d)(5) of the Clean Air Act for a redesignation of La Porte County from nonattainment in part to attainment for the entire county. There have been measured violations of the SO_2 NAAQS in the nonattainment portion of La Porte County and additionally, the rural RAM analysis of northern Porter County conducted by the Indiana DAPC predicted nonattainment. For the above reasons revision of the designation is not supported at the present time.

One commenter recommended reclassifying Wayne County from primary nonattainment of the SO_2 standard to unclassifiable stating that during at least one excursion, the company's electrostatic precipitators were out of service. The State of Indiana recommended changing the boundaries of the nonattainment area from the full county, to Webster, Boston, Center, Franklin, and Wayne Townships only. The State's recommendation was formalized in the June 12, 1978, 107(d)(5) petition. Since electrostatic precipitators are control devices used primarily for particulate control, their breakdown would be expected to have a negligible effect on SO_2. Moreover, of the three monitored excursions of the SO_2 standard, only one occurred during

a period of precipitator malfuction. Therefore the evidence supports the nonattainment designation for Wayne County, however, the recommendation of the State of Indiana to revise the geographic boundaries of the primary nonattainment area is accepted since all major sources and their areas of major impact are included in the area designated.

Four commenters recommended redesignation of Marion County from nonattainment for primary and secondary SO_2 standards to unclassifiable. Commenters challenged the validity of the monitored data which demonstrated violations of the 24-hour primary SO_2 standard and the accuracy and validity of dispersion models which predicted violations of the annual and short-term primary SO_2 standards. Upon evaluation EPA finds that the monitored data is valid and the dispersion modeling done for Marion County used an accepted model (CDM), which predicted annual violations of the SO_2 standard. These results have been supplemented by RAM runs which predicted short-term violations of the SO_2 standard. The overwhelming weight of evidence supports primary SO_2 nonattainment in Marion County and that designation will remain unchanged. Since secondary violations have been neither monitored nor predicted by dispersion modeling, Marion County is being reclassified as attainment for the secondary SO_2 standard.

One commenter recommended redesignation of Vigo County from primary SO_2 nonattainment to attainment. The commenter submitted a dispersion modeling report as evidence of attainment. The State of Indiana submitted the same report with a recommendation that Vigo County be changed from primary nonattainment to unclassifiable This recommendation was formalized in the State's June 12, 1978, petition The modeling report disputed the appropriateness of the urban RAM model in Vigo County, recommending in its place a modified version of rural RAM. The Agency reviewed the modeling report and determined that it does not meet the Agency's modeling stand-

ards. Computer dispersion studies using acceptable modeling procedures have predicted primary SO_2 standard violations. Therefore, revision of the designation is not supported at this time.

One commenter recommended that the designation of Gibson County be revised from unclassifiable for SO_2 to attainment. The State of Indiana also requested redesignation of Gibson County from unclassifiable to attainment in its June 12, 1978, petition. The commenter submitted a modeling study of Gibson County, indicating attainment of SO_2 standards. However, a previous USEPA modeling analysis of air quality in Gibson County indicated a potential for violations of the SO_2 NAAQS. Due to the number of unanswered questions concerning air quality in Gibson County, the designation for Gibson County should remain unclassifiable.

On June 12, 1978, the State of Indiana also petitioned that Jefferson County be redesignated from unclassifiable for SO_2 to attainment. A dispersion modeling study was submitted in support of the petition. A dispersion modeling study submitted by the State to region V, USEPA, indicated violations of the secondary standard. Region V is currently preparing an analysis of Jefferson County to resolve the discrepancies between these two studies. Until that analysis is completed, the SO_2 designation for Jefferson County will remain unclassifiable for the primary standard, and will be revised to nonattainment for the secondary standard.

[43 F. R. 46008]

§ 81.315 Indiana

INDIANA — SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Dearborn County			X	
Gibson County			X*	
Jefferson County			X*	
Lake County				
An area bounded on the north by Lake Michigan, on the west by the Indiana-Illinois State line, on the south by U.S. 30 from the State line to the intersection of I-65 then following I-65 to the intersection of I-94 then following I-94 to the Lake-Porter County line, & on the east by the Lake-Porter County line.	X			
The remainder of Lake County				X
LaPorte County				
An area bound on the north by Lake Michigan & the Indiana-Michigan State line, on the west by LaPorte-Porter County line, & on the south & east by I-94	X	X		

X* EPA designations replace State designations

INDIANA — SO_2 Continued

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
The remainder of LaPorte County				X
Marion County	X			
Porter County				
An area bound on the north by Lake Michigan, on the west by the Lake-Porter County line, on the south by I-80 & 90 & on the east by the LaPorte-Porter County line				
The remainder of Porter Co.				X
Vigo County	X			
Warrick County			X*	
Wayne County				
The area included within Boston, Center, Franklin, Wayne & Webster Townships	X			
The remainder of Wayne County				X
All portions of all other Indiana Counties				X

X* EPA designations replace State designations

5 U. S. C. § 553. Ruling making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to a agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules or agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall in-

corporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

5 U. S. C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

42 U. S. C. § 7407. Air quality control regions

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the administrator.

42 U. S. C. § 7407 (Cont.)

(c) The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which

42 U. S. C. § 7407 (Cont.)

there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

(e)(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within

42 U. S. C. § 7407 (Cont.)

such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extention granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

July 14, 1955, c. 360, Title I, § 107, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 103, 91 Stat. 687.

42 U. S. C. § 7409. National primary and secondary ambient air quality standards

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The pro-

42 U. S. C. § 7409 (Cont.)

cedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentration over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section .The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

42 U. S. C. § 7409 (Cont.)

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

July 14, 1955, c. 360, Title I, § 109, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1679, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 106, 91 Stat. 691.

42 U. S. C. § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine

42 U. S. C. § 7410 (Cont.)

months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that —

(A) except as may be provided in subparagraph (I), (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

42 U. S. C. § 7410 (Cont.)

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring

42 U. S. C. § 7410 (Cont.)

compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (iv) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which is implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

42 U. S. C. § 7410 (Cont.)

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

42 U. S. C. § 7410 (Cont.)

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons applying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revisions no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under section 7410(f) or (g) of this title (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent

42 U. S. C. § 7410 (Cont.)

the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this secttion, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source means a facility, building, structure, installation, real property,

42 U. S. C. § 7410 (Cont.)

road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility preconstruction or pre-modification review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any sources which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

42 U. S. C. § 7410 (Cont.)

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 shall not be required to be promulgated before the date eight months after such date required for submission.

42 U. S. C. § 7410 (Cont.)

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void on June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the

42 U. S. C. § 7410 (Cont.)

Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator

42 U. S. C. § 7410 (Cont.)

determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subpara-

42 U. S. C. § 7410 (Cont.)

graph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

42 U. S. C. § 7501. Definitions

For the purpose of this part and section 7410(a)(2)(I) of this title—

(1) The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410 (a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title.

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

42 U. S. C. § 7501 (Cont.)

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

July 14, 1955, c. 360, Title I, § 171, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746.

42 U. S. C. § 7502. Nonattainment plan provisions

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to to[1] the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

42 U. S. C. § 7502 (Cont.)

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 7504 of this title (relating to planning procedures) and include (A) an identification and analysis of the air

42 U. S. C. § 7502 (Cont.)

quality, health, welfare, economic, energy, and social effects of the plan provisions required by this subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a) of this section—

(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed sources which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment to the applicable national ambient air quality standard not later than December 31, 1987.

(c) In the case of a State plan revision required under the Clean Air Act Amendments of 1977 to be submitted before July 1, 1982, by reason of a demonstration under subsection

42 U. S. C. § 7502 (Cont.)

(a)(2) of this section, effective on such date such plan shall contain enforceable measures to assure attainment of the applicable standard not later than July 1, 1987.

July 14, 1955, c. 360, Title L, § 172, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746.

42 U. S. C. § 7607. Administrative proceedings and judicial review

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 7412 of this title, any standard of performance under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521 (b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule or order issued under section 7420 of this title (relating to non-compliance penalties, any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter 2 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7420 of this title, or his action under section [illegible](c)(2)(A), (B), or (C) or under regulations thereunder, or any other final action of the Administrator under this chapter which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the

42 U. S. C. § 7607 (Cont.)

Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(d)(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including order granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419

42 U. S. C. § 7607 (Cont.)

of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under subtitle B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under sections 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a

42 U. S. C. § 7607 (Cont.)

particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

42 U. S. C. § 7607 (Cont.)

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later that the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an

42 U. S. C. § 7607 (Cont.)

opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule

42 U. S. C. § 7607 (Cont.)

was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

42 U. S. C. § 7607 (Cont.)

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1522

SHARON STEEL CORPORATION,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 78-1523

BETHLEHEM STEEL CORPORATION,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR REVIEW
FROM THE ENVIRONMENTAL PROTECTION AGENCY

Argued March 23, 1979

Before ALDISERT, ADAMS and ROSENN, *Circuit Judges*

(Opinion filed April 25, 1979)

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OPINION OF THE COURT

ROSENN, *Circuit Judge*

Pursuant to the 1977 amendments to the Clean Air Act ("the Act") enacted by Congress, 42 U. S. C. A. § 7401 *et seq.* (West Supp. 1977), the Administrator of the Environmental Protection Agency ("Administrator") issued a final rule by which he determined the status of air quality for certain areas in the country in relation to national ambient air quality standards for various air pollutants. In his haste to implement the new Congressional provisions within the statutory deadline set by Congress, the Administrator dispensed with prior notice and comment before adopting the rule.

In this case we are asked to decide whether the Administrator had good cause to adopt the final rule without prior notice and

comment and, if so, whether the rule was arbitrary and capricious. We hold that the Administrator lacked good cause and that this matter must be remanded to him for further action. We need not determine whether the rule was arbitrary and capricious.

I.

Sharon Steel Corporation ("Sharon") and Bethlehem Steel Corporation ("Bethlehem") (collectively, the "companies") have brought petitions for review of the final rule issued by the Administrator. 42 U. S. C. A. § 7607 (West Supp. 1977). The challenged rule embodies the Administrator's determination that in four areas of Pennsylvania[1] the air does not meet the national ambient air quality standards for a pollutant known as "total suspended particulate."

We begin our analysis by placing this rule in its statutory context. The Administrator has issued standards for air quality under authority of the amended Act. That Act calls for the Administrator to formulate two types of standards: (a) "primary ambient air quality standards," which set such restrictions on pollution as are necessary to protect public health with an "adequate margin of safety"; and (b) "secondary ambient air quality standards," which decree those limits necessary to advance the public welfare (for example, by preventing damage to property). *See* 42 U. S. C. A. §§ 7409(b), 7602(h) (West Supp. 1977). In accordance with the Act, the Administrator has now promulgated primary and secondary standards governing six pollutants, including total suspended particulate.

According to the Act, each state must draw up a "state implementation plan," under which the air throughout the state must be brought into conformity with first the primary and later the secondary standards by certain statutory deadlines. To begin

1. The areas are the City of Sharon, the City of Farrell, the Allentown-Bethlehem-Easton Air Basin, and the Harrisburg Air Basin.

the procedures leading eventually to an implementation plan, every state, by December 5, 1977, had to collect data about air quality and submit to the Administrator a list designating each area of the state as "attainment," "non-attainment," or "unclassifiable." 42 U. S. C. A. § 7407(d)(1) (West Supp. 1977); 43 Fed. Reg. 40412 (September 11, 1978). The designation "attainment" meant that the quality of the air in an area already met both the primary and secondary standards; "non-attainment" meant that the air contained pollutant levels higher than those permitted by national ambient air quality standards. When there was insufficient information to decide whether the standards had been satisfied in a particular area, the state designated that area as "unclassifiable." After the states submitted their lists, the Administrator had until February 3, 1978, in which to "promulgate each such list with such modifications as he deem[ed] necessary." 42 U. S. C. A. § 7407(d)(2) (West Supp. 1977). The states then had until January 1, 1979, to compose their implementation plans, under which they detailed measures for achieving compliance by the statutory deadlines.

Pennsylvania duly submitted its list of designations to the Administrator. Without providing notice or an opportunity for comments, the Administrator issued the modified designations as a final rule.[2] In dispensing with the notice and comment requirement of the Administrative Procedure Act ("APA"), 5 U. S. C. § 553 (1976), the Administrator relied on the APA's exception for "good cause," 5 U. S. C. § 553(b)(B) (1976): "[T]his subsection does not apply . . . when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The statutory schedule for state implementation plans, the Administrator declared, created an urgency that precluded prior notice and comment. Although omitting prior notice and comment, the Administrator did invite comments in the sixty days

2. The Administrator missed the statutory deadline by a month and issued the rule on March 3, 1978.

after he promulgated the rule, and he promised to modify the rule if the comments should show any modification to be necessary.

Among the areas designated by the rule as "nonattainment" were the four involved in this case. In each of these areas, either Bethlehem or Sharon operates a plant, and the companies assert that the non-attainment designations will impose stringent limits on their operations. *See* n.8 *infra*. Contesting the designations on both procedural and substantive grounds, Bethlehem and Sharon filed petitions for review.

II.

Disputing the Administrator's declaration of good cause, the companies argue that the Administrator did not have sufficient justification for dispensing with prior notice and comment. We agree.[3]

The Administrator concedes that the action now under review was "rule making" under 5 U. S. C. § 553 (1976). Absent good cause, the APA requires prior notice of a proposed rule and an opportunity for interested persons "to participate in the rule making through submission of written data, views, or arguments. . . ." 5 U. S. C. § 553(c) (1976). In the Administrator's view, the statutory schedule decreed by the amended Clean Air Act, 42 U. S. C. A. §§ 7401 *et seq.* (West Supp. 1977), made prior notice and comment "impracticable" and "contrary to the public interest," so that the Administrator had good cause to forego these usual requirements. Had there been prior notice and comment, the Administrator contends, the states would not have had enough time to draw up their implementation plans. Because

3. The Fourth Circuit has ruled that 42 U. S. C. A. § 7607 (West Supp. 1977) does not vest jurisdiction in the courts of appeals to entertain petitions for review of "determinations made during the course of the agency's operations as to how its regulations will be interpreted and applied." *PPG Industries, Inc.* v. *Harrison,* 587 F. 2d 237, 244 (4th Cir. 1979). Because that case did not concern, and its reasoning did not reach, rulemaking under 5 U. S. C. § 553, it has no application here.

the states, under the terms of the Act, did not submit their initial designations until December 5, 1977, and because the Administrator needed until March 3, 1978, to review these designations,[4] the Administrator urges that a further delay for prior notice and comments would have made it difficult for the states to meet the January 1, 1979, deadline for their implementation plans.

Mindful that the APA's exception for good cause is to be narrowly construed, *American Iron & Steel Institute* v. *EPA*, 568 F. 2d 284, 292 (3d Cir. 1977), we must coordinate the commands of the APA and those of the Clean Air Act. In enacting amendments to the Clean Air Act, Congress gave no explicit indication that it intended to override procedural safeguards of the APA. The amendments set the December 5, 1977, deadline for submission of state designations, the February 3, 1978, deadline for the Administrator's review, and the January 1, 1979, deadline for state implementation plans. Even at the time when congress passed the amendments to the Clean Air Act, the circumstances that the Administrator advances as good cause should have been apparent. Nonetheless, Congress nowhere recorded any express indication that the 1977 amendments should relieve the Administrator from the ordinary procedures set forth in the APA for rulemaking.

It may be that the absence of an express Congressional intent to forego notice and comment does not absolutely prove an implicit intent to maintain those procedures and does not, therefore, settle beyond doubt the issue of good cause. We cannot, however, accept the Administrator's protestations that the statutory schedule precluded prior notice and comment. The Administrator received the Pennsylvania designations on December 5, 1977. As the Administrator informed this court, he modified state designations only when they were clearly incorrect.[5] The

4. The Administrator missed the statutory deadline of February 3 for review of the state designations as noted *supra* n. 2.

5. We express no opinion whether the Clean Air Act mandates a more stringent review than the Administrator undertook.

Administrator should have been able to publish the Pennsylvania designations within ten days after December 5, 1977, offering them not as a final rule but as a proposed rule. The APA provides that notice of rulemaking shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U. S. C. § 553(b)(3) (1976). Because the Administrator subjected Pennsylvania's designations to a review only for clear errors, the state's submission was likely to constitute the final rule, and its publication, at the least, would have given a "description of the subjects and issues involved" in the rulemaking.

Under the circumstances here, we conclude that the period for comments established by the APA would have run by January 15, 1978. If the Administrator took about ninety days to review the comments,[6] he could have issued a final rule on about April 15, 1978, instead of the March 3 date he achieved without notice and comments.[7] The states would then have had until January 1, 1979, in which to draft their plans. Although this period would be about one month less than the time that the Administrator was able to give the states, the period should still have been adequate. First, the states would then have known with certainty the content of the final rule, but under the procedure used by the Administrator the final rule issued March 3 was subject to change after a sixty-day period for comments following promulgation. Second, because the Administrator was largely fashioning his own designations according to the designations submitted by the states, the states (on the assumption they knew of this fact) could have begun as early as December 5 to draft their plans for attaining the national standards. From their own submissions, the states could have predicted the con-

6. The Administrator actually took about 120 days to review the comments received during the sixty-day period after promulgation.

7. If the Administrator issued the rule on April 15, he would have missed the statutory deadline of February 3. But the promulgation on March 3 also violated that deadline.

tent of the Administrator's final rule, which would incorporate substantially all of their designations.

The Administrator argues that even if he should have allowed notice and comment, the sixty-day period for comments *after* the rule was issued rendered his procedural violation harmless. He further contends that the companies suffered no harm because the designations were only for the benefit of the states in creating implementation plans. Although companies in non-attainment areas labor under significant burdens in gaining licenses to construct or modify their plants,[8] the Administrator contends that the designations declared by his rule will not be binding when the companies apply to the Environmental Protection Agency or Pennsylvania for licenses to build or modify facilities. At the time of their applications, the companies will be free to show that these four areas should be classified as "attainment" and that the most stringent requirements of the Clean Air Act therefore do not apply.

We hold that the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA. If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation. Provision of prior notice and comment allows effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change. *See Maryland* v. *EPA*, 530 F. 2d 215, 222 (4th Cir. 1975), *vacated and remanded on other grounds*, 431 U. S. 99 (1977).

8. The applicant must show, for example, that after construction or modification the total of emissions in the area will actually *decrease*. 42 U. S. C. A. § 7503(1)(A) (West Supp. 1977) (emission offsets). The applicant must also demonstrate compliance by *all* sources in other plants it owns and operates in the state. 42 U. S. C. A. § 7503(3).

Nor is the procedural violation harmless on the ground that the challenged designations will not be conclusive as to any applications by the companies to build or modify plants. The air quality standards obviously have a serious impact upon steel-making facilities, the operation of which emits pollutants into the atmosphere. The designations fixed by the Administrator evidently will have some weight, even if they will not be dispositive.[9] Moreover, the uncertainty about what weight these designations will carry in future proceedings may influence the companies' current plans for construction. The Administrator's failure to abide by the APA, we conclude, was not harmless.

III.

In hearing a petition for review, a court of appeals may exercise equitable powers in its choice of a remedy, as long as the court remains within the bounds of statute and does not intrude into the administrative province. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F. 2d 336, 346 (D. C. Cir. 1974) (opinion on rehearing). *See Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 373 (1939). Although the companies are entitled to relief, we must be careful not to grant relief so broad as to endanger the Congressional scheme for the control of air pollution.

Following the example of *Duquesne Light Co.* v. *EPA*, 481 F. 2d 1, 10 (3d Cir. 1973), we leave the challenged rule in effect except as to the specific designations contested in this case and as applied to these two petitioners alone. None of the Pennsylvania designations other than the four here involved will be in any way disturbed. At the same time, basic fairness requires that Sharon and Bethlehem be restored, as nearly as possible, to the position they would have occupied if the Administrator had afforded them their rights to prior notice and

9. At oral argument, counsel for the Administrator characterized a non-attainment designation as a "working hypothesis," which an applicant for a construction permit "will have every opportunity to rebut."

an opportunity for comment. We therefore remand to the Administrator, with the direction that the Administrator shall forbear from applying to Sharon and Bethlehem any of the requirements or sanctions imposed on non-attainment areas by the 1977 amendments to the Clean Air Act until the Administrator shall have conducted a limited legislative hearing in which he gives these two companies the required statutory notice and opportunity for participation and comment as provided by the APA, 5 U. S. C. § 553 (1976).

IV.

The companies have moved to supplement the record in this case by adding an internal memorandum written by a lawyer in the Environmental Protection Agency. This memorandum, the companies argue, shows that the Administrator was aware of possible legal problems in his decision to dispense with prior notice and comment. Because counsel for the Administrator conceded at oral argument that the Administrator had forewarning of these possible problems, it would be redundant to supplement the record, and the motion will be denied.

The petition for review will be granted and the case will be remanded to the Administrator for proceedings not inconsistent with this opinion. Costs taxed to the respondent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 78-1922

UNITED STATES STEEL CORP.,
Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 78-1927

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY
(May 3, 1979)

Before GODBOLD, *Circuit Judge,* SKELTON,* *Senior Judge,* U. S. Court of Claims, and RUBIN, *Circuit Judge.*

GODBOLD, Circuit Judge:

Petitioners United States Steel and Republic Steel have petitioned for review of the Environmental Protection Agency's designation of areas in Alabama as nonattainment areas for

* Honorable Byron G. Skelton, Senior Judge, U. S. Court of Claims, sitting by designation.

suspended particulate pollution pursuant to § 107(d) of the Clean Air Act, 42 U. S. C. § 7407(d).[1] These designations mean that particulate levels in these areas[2] exceed the national primary ambient air quality standards set by the EPA under § 7409.

The steel companies' challenges rest on several grounds, substantive as well as procedural. We do not reach the substantive issues on either petition, for we agree with both petitioners that in making the designations the EPA failed to follow the procedures required by the Administrative Procedure Act, 5 U. S. C. § 553. We therefore set aside the designations and remand to the Agency so that it may repromulgate the Alabama nonattainment list after proper public notice and opportunity to comment.

We begin with a consideration of the purposes and effects of the § 7407(d) designations, for these factors are critical in our evaluation of the major legal issues raised: ripeness of the action for judicial review, applicability of the "good cause" exception to notice and comment under 5 U. S. C. § 553, and the Agency's claim of harmless error.

The primary function of the designations is as a preliminary step in formulating a state plan to meet all primary ambient air quality standards. Congress recognized in 1977 that these standards were not met by the original target dates,[3] and provided for a new timetable in the Clean Air Act Amendments of 1977, P. L. 95-95, 91 Stat. 685. The states[4] were directed to submit

1. The Act is codified at 42 U. S. C. §§ 7401-7642. We will hereafter cite only to U. S. Code sections.

The § 7407(d) designation was published as a "Final rule" on March 3, 1978, 43 Fed. Reg. 8962, and republished on September 11, 1978, 43 Fed. Reg. 40412.

2. The challenged designations involve parts of Jefferson County (U. S. Steel) and Etowah County (Republic Steel).

3. *See* H. Rept. 95-294 at 207 (1977).

4. The Alabama agency responsible for state actions required by the Act is the Alabama Air Pollution Control Commission (AAPCC).

a list of nonattainment areas to the EPA by December 5, 1977 (120 days after the date of enactment of the 1977 Amendments). 42 U. S. C. § 7407(d)(1). The EPA was then to review, modify if necessary, and promulgate the lists within 60 days. § 7407(d)(2). Thus the EPA promulgation should have occurred by February 3, 1978. These designations are among the factors to be taken into account by a state in development of its state implementation plan (SIP) to attain the primary standards, 42 U. S. C. §§ 7410, 7502. Submission of the SIP revisions was due January 1, 1979 (§ 129(c) of the Amendments, 91 Stat. 750-51 (uncodified)); the submission must provide for attainment of the primary standard for particulates by December 31, 1982.[5] The procedures quickly fell behind the statutory schedule. The AAPCC submitted its list December 22, 1977, and the EPA promulgated it March 3, 1978.

The EPA is correct in characterizing the nonattainment designation, insofar as it is part of the SIP revision process, as a preliminary step that in itself would perhaps be unripe for judicial review. But even accepting this point, and disregarding U. S. Steel's claim that it has already been harmed by the AAPCC's response to the designation,[6] we find that the designations have consequences apart from their role in the SIP revision process that constitute a substantial injury to the petitioners and clearly make the controversy ripe for review. These consequences arise from the EPA's interpretive ruling of December 21, 1976, concerning emission offsets (the Offset Ruling), 41 Fed. Reg. 55524. The Offset Ruling places strict limitations on construction of new facilities, or modification of existing facilities, that will contribute to an existing violation

5. Under some conditions attainment may be delayed for certain other pollutants until December 31, 1987. § 7502(a)(2).

6. U. S. Steel claims that the AAPCC has recently promulgated regulations pertaining to coke ovens. The AAPCC regulations are not part of the Administrative Record on appeal. Since we find that there is other injury to petitioners, we need not consider this matter any further, nor need we rule on U. S. Steel's motion to add pertinent material to the record pursuant to F. R. A. P. 16(b).

of a national ambient air quality standard. Such construction will only be allowed if the proposed facility will use the requisite technology to attain "the lowest achievable rate for such type of source" and if new emissions from the proposed facility will be more than offset by reductions elsewhere.[7]

Moreover, the Offset Ruling is not a mere statement of policy. Its provisions have the force of law and are enforceable by the EPA. In enacting the Amendments, Congress explicity adopted the Ruling, with minor modification, as an interim limitation on construction in nonattainment areas.[8] Another provision of the Amendments empowers the EPA, if it finds that a state is not enforcing the provisions of the Ruling, to enforce it directly. 42 U. S. C. § 7413(a)(5). In such a situation the EPA may sue to enjoin construction and for a civil penalty of up to $25,000 per day. 42 U. S. C. § 7413(b)(5).

EPA concedes the petitioners' contention that the § 7407(d) designations are ripe for review, and we agree. The leading case on the issue of ripeness is *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 18 L. Ed. 2d 681 (1967). There the Court allowed a challenge to an FDA drug labeling rule, emphasizing the great risk of loss to the petitioners if they had to await enforcement to challenge the rule's validity. Such loss included the possibly wasteful reprinting of labels and other materials, as well as criminal and civil penalties that could be imposed in enforcement proceedings. *Id.* at 152-53, 18 L. Ed. 2d at 694. The situation here is similar. If the § 7407(d) designations are valid, they necessarily bring the Offset Ruling into play with regard to any proposed new sources in the area.[9] If the petitioners were forced to wait to challenge the designations until the EPA took enforcement action under § 7413(b)(5), they would face similar risks of civil penalties and lost investment in uncompleted improvements.[10] We therefore find the controversy ripe for review.

Having determined the EPA's action reviewable, we must still determine whether we are the appropriate reviewing court. We recently held in *PPG Industries, Inc.* v. *Harrison,* 587 F. 2d 237 (CA5, 1979), that despite the 1977 revisions to 42 U. S. C. § 7607(b), which provides for direct review in the courts of appeals of certain EPA actions, some actions will be reviewable only in the district courts. Our reason for that holding was our

7. The required offset may be from facilities of the proposing owner or from other facilities. However, due to the localized nature of the impact of particulate emissions, such offsets will usually be required to be "on the same premises or in the immediate vicinity of the new source." Ruling Pt. IV, ¶ D, 41 Fed. Reg. at 55529.

8. P. L. 95-95, § 129(a), 91 Stat. 745 (uncodified). The effect of § 129(a) was intended to expire as of July 1, 1979, at which time it was to be replaced by the substantially similar provisions of 42 U. S. C. § 7503. For the reasons discussed below, our remand necessitates the extension of § 129(a) beyond July 1. Under either provision, however, it is clear that the EPA has enforcement authority over new construction in a nonattainment area.

9. The Ruling expressly applies to any new construction that "would exacerbate an 'existing' violation . . . of a NAAQS [national ambient air quality standard]." Ruling, Pt. IV, 41 Fed. Reg. at 55528 (December 21, 1976). Therefore any new source in a designated area would necessarily be subject to it. The EPA argues that a § 7407(d) designation is not conclusive in decisions under the Ruling, and quotes from a recent agency statement that the Ruling applies "regardless of the designation applicable to the locality where the source or the violation is found." 43 Fed. Reg. 40412, 40413 (September 11, 1978). However, this statement when read in context is clearly aimed at the problem of a polluter outside of a nonattainment area contributing to a violation within it. The September 11 statement indicates that such polluters are subject to the Offset Ruling without regard to their being outside. It does nothing to contradict the fact that the Ruling applies to any new source within a designated area.

10. EPA argues that petitioners will have an opportunity to challenge the § 7407(d) designation in conjunction with the process of revising the implementation plan. But the Offset Ruling, as enacted by § 129(a) of the Amendments, is an interim measure that does not require existing SIP provisions. Enforcement of it under § 7413(b)(5) could occur before the SIP revisions are final and reviewable. This case is therefore distinguishable from *Bethlehem Steel* v. *EPA,* 536 F. 2d 156 (C. A. 7, 1976). There the designation of an air quality maintenance area was held unripe because the only effect of the designation was to begin a process of developing emissions standards.

recognition that "the mechanical limitations of the courts of appeals" make impracticable their review of agency actions that are made without the development of a full record. *Id.* at 244-45. Jurisdiction was found lacking in *PPG Industries* because the action there (a ruling that a certain regulation was applicable to a specific plant) was evidenced only by an exchange of correspondence. Here the challenged action is EPA promulgation of regulations that have general effect in the specified areas, and it was based on a substantial record.[11] We therefore find that the considerations that gave rise to the result in *PPG Industries* are absent, and we have jurisdiction under § 7607(b).

On the merits the petitioners' principal argument is that before making the § 7407(d) designations, the EPA was obliged under the Administrative Procedure Act (APA), 5 U. S. C. §§ 551 *et seq.*, to give notice and receive pre-promulgation comcents from interested parties. Clearly there was no notice and comment period before the March 3, 1978 promulgation of the list. The EPA did attempt to provide opportunity for input by affected parties by accepting comments for 60 days after the March 3 promulgation, which were used in making modifications to the designation list. The list was repromulgated on September 11, 1978, 43 Fed. Reg. 40412, with several changes, although none affecting the challenged designations. We agree with petitioners that the EPA's procedures failed to comply with the APA and that we must remand for reconsideration of the designations.

11. U. S. Steel has moved to have items added to the Administrative Record pursuant to F. R. A. P 16(b), but since they are documentary the problem of *PPG Industries* is not posed by them. Moreover, in light of the conclusions we have reached on the merits of petitioners' procedural claims, we deem it unnecessary to rule on the motion. Among the proffered items the only one relevant to our disposition is the EPA's Offset Ruling. Since this was published in the Federal Register we may consider it regardless of whether it is part of the record. Similarly we find it unnecessary to rule on U. S. Steel's motion to reconsider this court's grant of EPA's motion to supplement the record. The subject of the latter motion was the EPA's September 11, 1978 repromulgation of the nonattainment list, which was also published in the Federal Register.

EPA does not contend that its § 7407(d) designations were not "rules" under the APA or that they are not therefore subject to the rule making provisions of § 553. Indeed, the designations clearly come within the broad statutory definition, 5 U. S. C. § 551(4), since they are agency statements of future effect[12] designed to "implement, interpret, or prescribe law or policy." Instead the EPA recognized the APA's approach of defining "rule" very broadly but creating substantial exceptions to the procedural requirements of § 553. The exception claimed is that of § 553(b)(B), which provides that notice of proposed rule making need not be given

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The EPA included a statement of the sort required in its March 3, 1978 designation.[13] Its principal argument appears to be that

12. As indicated above, the effect is twofold: limiting new construction by the Offset Ruling and beginning the process of SIP revision.

13. The full text of the statement, which appears at 43 Fed. Reg. 8962, is as follows:

> The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act [42 U. S. C. §§ 7410(a)(2)(I), 7502]. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The statement appears to invoke both the notice and comment exception of § 553(f)(B) and a similar exception contained in § 553

(Footnote continued on next page.)

compliance with the statutory timetable required action without the usual notice and comment period. The Agency was under pressure, since the time allowed by Congress was short. But the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception. *American Iron and Steel Institute* v. *EPA*, 568 F. 2d 284, 292 (CA3, 1977); *Shell Oil Co.* v. *FEA*, 527 F. 2d 1243, 1248 (TECA, 1975). The deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment. Here, for example, the EPA gives no explanation of why it could not at least have published the AAPCC's initial list upon receipt and accepted comments during the time it was reviewing the list. This would have afforded petitioners some warning of the imminent designations and allowed them opportunity to influence the agency's action.

Moreover, it is clear that the EPA did not regard the statutory deadline as sacrosanct, since the nonattainment list was not published until a full month after the deadline.[14] The EPA therefore stresses as the good cause justifying noncompliance the need to provide guidance to the states in formulating their SIP revisions. This argument falters for several reasons. First, the

(Footnote continued from preceding page.)

(d)(3) of the requirement that a rule be published not less than 30 days before its effective date. The only question before us here is the notice and comment exception of § 553(b)(B).

14. Republic Steel argues that the § 7407(d) designations are invalid because they were not published in accordance with the statutory timetable. Its argument is based on § 7407(d)(4), which provides that any areas not classified within 180 days of the enactment of the 1977 Amendments must be deemed unclassifiable under § 7407(d)(1)(D). Carried to its logical conclusion, the argument is that once the February 3, 1978 deadline passed, the EPA was forever barred from making designations. Such as assertion is inconsistent with the general purpose and approach of the Amendments and if followed would thwart the intent of Congress to have the designations and SIP revisions completed. We therefore read § 7407(d)(4) as saying that after February 3, 1978, an unclassified area will be deemed a § 7407(d)(1)(D) area until an effective designation is made. Thus it is no bar to EPA redesignation on remand.

respective states already had most of the information contained in the EPA's designations, since those designations were based on submissions by the states. The statute indicates that the EPA's role is limited to reviewing the state designations and modifying them where necessary. 42 U. S. C. § 7407(d)(2). The states could have begun the revisions with the information on hand, changing them later as required by EPA alterations of the § 7407(d) list.

Furthermore, the EPA undercuts its own argument on this point by repeatedly emphasizing elsewhere the preliminary nature of the § 7407(d) designations in the entire process. The designations had little legal effect on the states; rather they were important in guiding the SIP revisions. The same guidance that was accomplished by the EPA's procedures could have been accomplished by issuing a proposed list in March, followed by final promulgation after notice and comment. Indeed the major difference between such a procedure and that chosen by the Agency had nothing to do with guiding the states. It was the invocation of the limitations of the Offset Ruling, which followed only from effective § 7407(d) designations.

In short the Agency has simply failed to show strong enough reason to invoke the § 553(b)(B) exception. This exception should be read narrowly. *American Iron and Steel Institute* v. *EPA*, *supra*, 568 F. 2d at 292. It is an important safety valve to be used where delay would do real harm.[15] It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it incovenient to follow them.

15. Use of the exception has repeatedly been approved, for example, in cases involving government price controls, because of the market distortions caused by the announcement of future controls. *See De Rieux* v. *Five Smiths, Inc.*, 499 F. 2d 1321, 1332 (TECA), *cert. denied*, 419 U. S. 896, 42 L. Ed. 2d 141 (1974); *Nader* v. *Sawhill*, 514 F. 2d 1064, 1068 (TECA, 1975). The exception was also held applicable to regulations concerning gas stations, where temporary shortages and discriminatory practices were found to have deprived some users of any supply and led to violence. *Reeves* v. *Simon*, 507 F. 2d 455, 458-59 (TECA, 1974), *cert. denied*, 420 U. S. 991, 43 L. Ed. 2d 672 (1975).

EPA argues that even if it was obliged to afford opportunity for § 553 notice and comment before making the designations, its failure to do so was cured by its acceptance of comments after the effective date. The argument mixes notions of mootness, harmless error, and minimal injury to petitioners. While the substantial public health interests involved give these arguments some surface appeal, accepting them would lead in the long run to depriving parties affected by agency action of any way to enforce their § 553 rights to pre-promulgation notice and comment.

Essentially the argument is that despite its lack of literal compliance with § 553 the EPA satisfied the intent of § 553 by accepting post-promulgation comments and keeping an open mind about revisions. The EPA overlooks, however, the crucial difference between comments before and after rule promulgation. Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. Other courts have recognized this difference and rejected arguments similar to that asserted here:

> Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way. . . . "We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *fait accompli*."

City of New York v. *Diamond*, 379 F. Supp. 503, 517 (S. D. N. Y. 1974), *quoting Kelly* v. *Department of Labor*, 339 F. Supp. 1095, 1101 (E. D. Cal. 1972). Similar conclusions were reached in *Maryland* v. *EPA*, 530 F. 2d 215, 222 (CA4, 1975), *vacated on other grounds sub nom. EPA* v. *Brown*, 431 U. S. 99, 52 L.Ed. 2d 166 (1977), and *Wagner Electric Corp.* v. *Volpe*, 466 F. 2d 1013, 1020 (CA3, 1972). The case at

hand does not differ from these in any significant way. Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with prepromulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.

The EPA's position is not advanced by its assertions that the § 7407(d) designations are but the first step in an extended process and have little impact on petitioners. As we have discussed above, the designations have collateral effects that pose significant and immediate problems for petitioners. These continuing effects make the validity of the designations a live issue.

Nor can the Agency rest on the doctrine of harmless error. While that doctrine has been held applicable to review of agency actions, and has statutory sanction in the APA,[16] it is to be used only "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Braniff Airways* v. *CAB*, 379 F. 2d 453, (CADC, 1967). Here the Agency's error plainly affected the procedure used, and we cannot assume that there was no prejudice to petitioners. Absence of such prejudice must be clear for harmless error to be applicable. *See Alabama Ass'n of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F. 2d 224, 236 (CA5, 1976), *cert. denied*, 435 U. S. 904, 55 L. Ed. 2d 494 (1978); *Unification Church* v. *Attorney General for the U. S.*, 581 F. 2d 870, 872-73 (CADC), *cert. denied*, ... U. S. ....., 58 L. Ed. 2d 122 (1978); *Haltmier* v. *Commodity Futures Trading Comm'n*, 554 F. 2d 556, 562 (CA2, 1977).

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16. 5 U. S. C. § 706 provides that in judicial review of agency actions "due account shall be taken of the rule of prejudicial error." Although the judicial review provisions of the APA have been held not strictly applicable to direct review in the courts of appeals, *Natural Resources Defense Council* v. *NRC*, 539 F. 2d 824, 837 (CA2, 1976), *vacated on other grounds*, 434 U. S. 1030, 54 L. Ed. 2d 777 (1978), we nevertheless find this principle applicable.

Procedures on Remand

We turn now to the problem of the timing of procedures on remand. While the EPA and the AAPCC must abide by the procedural requirements of the Clean Air Act and the APA, they must also act expeditiously in order to fulfill Congress' principal goal of attaining the primary air quality standards by the end of 1982.

The first procedure on remand will be a reconsideration of the designations by the EPA.[17] The EPA must give notice of the proposed designation and allow comment in accordance with § 553.[18]

A more difficult question is that of the required timing of the SIP revision. The 1977 Amendments set out in detail when required actions of state pollution authorities must be taken. Section 406(d)(2), 91 Stat. 796 (uncodified), provides generally that SIP revisions made necessary by the Amendments are to be made within one year of the Amendments' effective date or within nine months of EPA promulgation of any pertinent regulation. However, the Amendments also specifically required that all states in which there is any nonattainment area submit SIP revisions satisfying the Amendments' nonattainment

17. There is no need for the AAPCC to reconsider its initial designation list, since we see no indication of procedural error on its part. We reject petitioner Republic Steel's contention that the AAPCC was required by 42 U. S. C. § 7410(a)(2) to hold public hearings prior to its designation. That section and the regulation implementing it, 40 C. F. R. § 51.4(a)(1), require hearings for proposed implementation plans, revisions to those plans, and compliance schedules. The mere fact that the nonattainment designations are a preliminary step toward an SIP revision does not bring the hearing requirement of § 7410(a)(2) into play.

18. U. S. Steel also claims that the EPA rule making procedures set forth in 42 U. S. C. § 7607(d) apply to § 7407(d) designations. It cites no authority for this proposition, and such designations are plainly not among the actions enumerated in § 7607(d). Its provisions are not applicable, and on remand the Agency need only satisfy the requirements of 5 U. S. C. § 553.

provisions[19] by January 1, 1979. Section 129(c), 91 Stat. 750-51 (uncodified).

Since it is impossible for the Alabama SIP to be submitted by January 1, 1979, the general provision of § 406(d)(2) should apply. Thus the AAPCC will have nine months[20] after final EPA promulgation of the nonattainment list to revise and submit its plan. During this time the state must hold public hearings pursuant to 42 U. S. C. § 7410(a)(2). The EPA must then approve or disapprove the plan within four months of the date of submission. *Id.*

Remand will predictably delay beyond July 1, 1979, adoption of revisions of the Alabama SIP dealing with the areas in question as nonattainment areas. The EPA has indicated that there could be dire consequences from delaying the SIP revisions beyond July 1 and at least implies that the statute may require a moratorium on all new construction in the areas.[21] This issue of whether a moratorium on new construction is required has not been briefed, and we approach it with reluctance. Nevertheless,

19. These provisions, 42 U. S. C. §§ 7501-7508, constituting Part D of Title I of the Act, were added by § 129(b) of the Amendments, 91 Stat. 745-50.

20. We do not decide whether under the circumstances EPA can prescribe a reasonable period of less than nine months. In any event, it may well be possible that AAPCC will not need the full nine months.

21. In the September 11, 1978 repromulgation of the nonattainment list, the EPA stated that

> for any designated nonattainment area without an adequate approved or promulgated nonattainment plan, the conditions of the Emission Offsets Interpretative Ruling will be replaced with a ban on new construction after June 30, 1979, when the requirements of State nonattainment plans are to be in effect.
>
> The ban on construction will apply to any major new source or major modification that will cause or significantly contribute to an air quality violation within the nonattainment area.

At oral argument, counsel for the EPA stated that unless a plan is approved by July 1, a state will "be subject to very severe growth and economic limitations."

time and certainty are important and further delays by litigation undesirable. Therefore, we address the moratorium point.

The only part of the Act that arguably calls for a moratorium on new construction in these circumstances is § 7502(a)(1). That section provides:

> The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

The language of this section evinces a desire to prevent construction in nonattainment areas except in accordance with a plan whose provisions conform to the statute.[22] This desire is borne out by the section's legislative history.[23] But the language does not purport to add any substantive conditions or add any sanctions. It simply refers to the provisions "required by section 7410 (a)(2)(I) . . . as a precondition." We must therefore look to § 7410 to see how Congress sought to effectuate its intent.

Section 7410 requires the states to submit implementation plans and sets out in detail requirements for those plans. It is applicable to the entire plan, not merely to the provisions

22. The detailed restrictions on this part of the SIP are contained in §§ 7502(b) and 7503.

23. The Conference Report section describing § 129 of the Amendments (which enacted 42 U. S. C. §§ 7501-7508) stated that "[a]s a condition for permitting major new sources to locate in a nonattainment area, States are required to have approved revised implementation plans." H. Conf. Rept. 95-564 at 157. The report then goes on to describe the required provisions of the plan. This passage does not alter, however, our reading of § 7502(a) in its context in the Act.

regarding nonattainment areas. Section 7410(a)(2) calls for action by the Administrator of EPA approving or disapproving submitted SIP provisions. This subsection lists several requirements that the plan must meet to be acceptable for EPA approval. Among these is § 7410(a)(2)(I), which requires that a plan forbid any construction of new emission sources in a nonattainment area except for those approved in accordance with the permit program described in § 7503. Section 7410(c)(1) indicates what the primary sanction is when a state fails to submit a plan acceptable under § 7410(a)(2). Such failure allows the EPA to promulgate a plan for the state.[24] This provision would have allowed EPA to have taken over the SIP development had Alabama simply failed to do so.

This discussion of § 7410 reveals two points, we think. First, we need not read the vague language of § 7502 as imposing any sort of moratorium in order to effectuate the intent of Congress. The provisions of § 7410(c)(1) give EPA an effective means to deal with intransigence at the state level. Second, Congress has consistently invoked sanctions against the states only where they have failed to take timely action as required by statute. While the original statutory deadline for submission of the SIP revisions was January 1, 1979, the EPA's improper procedure has made that impossible. Until Alabama submits its SIP revisions, EPA does not have authority to prevent all construction or otherwise supplant the state's role in this process.

This is not to say that new construction may proceed without limit, however. As indicated above there are two sources of authority for EPA enforcement action to block construction in a nonattainment area. One is § 7413(a)(1), which permits the EPA to enjoin any action taken in violation of the SIP.

24. Specifically, § 7410(c)(1) instructs the EPA to promulgate a plan within six months of the time by which the state should have submitted one. This provision coincides with the intended timetable for action on the nonattainment SIP revisions. They were originally due from the states on January 1, 1979. Whatever sanctions might have been intended by § 7410 or § 7502 were not to be effective until July 1, 1979.

Until the SIP, with its required § 7503 permit program, is promulgated, § 7413(a)(1) cannot provide the basis of enforcement. The other relevant provisions are §§ 7413(a)(5) and 7413(b)(5), which allow the EPA to halt construction commenced in violation of the Offset Ruling, as enacted by § 129(a)(1) of the Amendments. But since § 129(a) by its terms is effective only through June 30, 1979, it may be argued that the EPA will have no enforcement authority at all in this area between July 1, 1979, and final promulgation of the Alabama SIP.

Certainly unchecked new construction in designated nonattainment areas[25] will no more effectuate the intent of Congress than would a total moratorium. For that intent was "to allow reasonable economic growth to continue in an area while making reasonable further progress to assume attainment of the standards by a fixed date." H. Rept. 95-224 at 211. To resolve this problem we must look to the entirety of § 129 of the Amendments. That section deals comprehensively with the problem of nonattainment areas: § 129(b) sets out in detail the provisions to be made by the SIP; § 129(c) required submission of the SIP by January 1, 1979; and § 129(a) provided for interim provisions (those of the Offset Ruling) to be effective through June 30, 1979. The plain intent of the section is that at all times after a § 7407(d) designation the provisions of the Offset Ruling or the substantially similar provisions of § 7503 would apply. The scheme was based on the premise that the SIP revisions would be completed on time. While that premise has turned out not to be true, we hold that to carry out the statutory purpose EPA may enforce the Offset Ruling

25. Clearly there can be no restrictions on construction under any of these provisions until there is an effective § 7407(d) designation. However, it appears likely that there will be such a designation shortly, and that there will be a substantial period of time between that time and promulgation of the Alabama SIP.

as enacted in § 129(a) from and after the time that a § 7407(d) designation is made and until such time as SIP revisions consistent with § 7103 are adopted.

The petitions to set aside the § 7407(d) designations are GRANTED, and the cause is REMANDED to the Environmental Protection Agency for new proceedings consistent with this opinion.

No. 79-486

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES STEEL CORPORATION AND YOUNGSTOWN SHEET AND TUBE COMPANY, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1979. The petition for a writ of certiorari was filed on September 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the determination of the Administrator of the Environmental Protection Agency that good cause existed to promulgate air quality nonattainment designations without prior notice and opportunity for comment.

2. Whether the court of appeals properly applied the standards for judicial review under the Clean Air Act in finding that the alleged procedural error of the Administrator of the Environmental Protection Agency was not sufficient to require reversal of the agency's air quality nonattainment designations.

STATEMENT

In the Clean Air Act Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676), Congress directed that the national ambient air quality standards established under Section 109, 42 U.S.C. 7409,[1] be attained throughout the country by mid-1975. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). However, in considering the 1977 amendments to the Act, Congress became aware that those standards still had not been achieved in many areas of the country. This failure was attributed to inadequate restrictions for certain sources of pollution, insufficient enforcement of those restrictions, and noncompliance by the pollution sources. In particular, Congress took note of the steel industry's especially poor compliance record. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 207, 210-211 (1977).

As a result of this widespread failure to meet the original statutory deadline, Congress, in the 1977 amendments, adopted a new regulatory approach. The first step was to identify all areas where the air quality was below the applicable standards and to designate those areas as "nonattainment areas." Section 107(d), 42 U.S.C.

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[1]The Clean Air Act (formerly 42 U.S.C. 1857 *et seq.*) is now codified as 42 U.S.C. (Supp. I) 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In this Brief in Opposition, citations will refer to the current codification of the Clean Air Act, as amended.

7407(d). Each state was required under Section 107(d)(1) to assess its air quality and to submit proposed area designations to the Environmental Protection Agency (EPA) by December 5, 1977. Pursuant to Section 107(d)(2), the Administrator of EPA was to review each state's proposed designations and promulgate a final list, with any modifications he deemed necessary, by February 3, 1978. For the designated nonattainment areas, the 1977 amendments require that pollution restrictions be imposed to ensure attainment of the standards as expeditiously as possible. Sections 171-178, 42 U.S.C. 7501-7508.

On March 3, 1978, the Administrator published the list of area designations for the entire country. 43 Fed. Reg. 8962 (Pet. App. A21-A33). Overall, more than 1,300 counties were designated as nonattainment areas for one or more pollutants (*id.* at A30). In particular, the Administrator approved the State of Indiana's designation of portions of Lake County (Gary and East Chicago, Indiana) as a sulfur dioxide (SO_2) nonattainment area (*id.* at A32).

The nonattainment designations were made immediately effective without an opportunity for prior notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. 553(b) and (d). The Administrator determined that the tight statutory schedule of the amendments made it impracticable and contrary to the public interest to postpone the effective date of the designations (Pet. App. A23). Accordingly, the Administrator concluded that good cause existed under the APA to promulgate the designations to be effective immediately (*ibid.*). In addition, the Administrator solicited public comment on the designations for 60 days and committed the agency to revise the designations as appropriate in light of those comments (*ibid.*).

Petitioners sought judicial review of the designations in the court of appeals under Section 307(b)(1), 42 U.S.C. 7607(b)(1). Thereafter, the court granted EPA's motion to stay proceedings pending the agency's consideration of public comments. On October 5, 1978, the Administrator issued a revised list of designated nonattainment areas. 43 Fed. Reg. 45993, 46007-46008 (Pet. App. A34-A42). While modifying the designations with respect to some areas (including several in Indiana), the Administrator affirmed the original designation of Lake County as a sulfur dioxide nonattainment area. He concluded that since violations of the primary air quality standard had been measured in the industrialized section of the County, a nonattainment designation was required. See Section 171(2), 42 U.S.C. 7501(2).

The court of appeals affirmed EPA's nonattainment designation for Lake County, finding that petitioners' procedural and substantive challenges were without merit (Pet. App. A1-A20). The court held that the "legislative scheme" of the 1977 amendments (*id.* at A7), and particularly the "series of tight statutory deadlines" (*ibid.*), the "time-consuming process" of developing revised state plans for designated nonattainment areas (*id.* at A7-A8), and the "adverse impact on health that any further delays would entail" (*id.* at A10), gave the Administrator good cause under the APA to dispense with prior notice and comment and to make the designations immediately effective. The court also noted that the problem of delay had been compounded by the failure of some states to meet their deadlines for submitting proposed designations to EPA (*id.* at A9). Finally, throughout its opinion, the

court stressed the clear congressional intent in the 1977 amendments that the air quality standards be attained "as expeditiously as practicable" (*e.g.*, *id.* at A7-A8, A13).[2]

In addition, the court observed in dicta (Pet. App. A12-A15) that, even if good cause did not exist, invalidation of the Secretary's action was not warranted under Section 307(d)(9) of the Clean Air Act, 42 U.S.C. 7607(d)(9). The court explained that Section 307(d)(9) was designed to limit judicial review of EPA rulemaking in order to avoid "endless litigation over technical and procedural irregularities" (*id.* at A13). The court found that Section 307(d)(9) extended to the designation of nonattainment areas either as an action by the Administrator promulgating an implementation plan or significant deterioration regulations (*id.* at A14 n.12) or as one of the general EPA rulemaking actions intended by Congress to be covered by the judicial review provisions of the 1977 amendments (*id.* at A14). Applying Section 307(d)(9) to the procedural errors alleged by petitioners, the court concluded that "none of the prerequisites for reversal have been satisfied" (*ibid.*).[3]

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[2]The court specifically declined to follow decisions of the Third and Fifth Circuits holding that the Administrator did not have good cause under the APA (Pet. App. A8-A9 n.5, A9 n.7, A10-A11 n.10, A11-A12 n.11, A15 n.14). Moreover, the Seventh Circuit panel circulated its opinion among all judges of the court in regular service, and a majority did not favor rehearing *en banc* on this difference among the circuits (*id.* at A13 n.11).

[3]The court also dismissed petitioners' substantive challenge to the Lake County nonattainment designation. This issue is not presented as a reason for granting the petition.

ARGUMENT

1. Petitioners correctly note (Pet. 8-17) that the Seventh Circuit decision in this case, in sustaining the Administrator's determination of good cause under the APA, is in conflict with the decisions of the Third Circuit in *Sharon Steel Corp.* v. *EPA*, 597 F. 2d 377 (1979) (Pet. App. A75-A84), and of the Fifth Circuit in *United States Steel Corp.* v. *EPA*, 595 F. 2d 207 (1979) (Pet. App. A85-A101).[4] However, in the circumstances presented here, such a conflict does not warrant review by this Court.

The statutory scheme of the 1977 amendments to the Clean Air Act confronted EPA with a unique situation. The express purpose of the amendments was to remedy the past failure to meet the national ambient air quality standards and to ensure that those standards would be achieved "as expeditiously as possible." The amendments established a regulatory process, governed by a series of very tight statutory deadlines, in which each subsequent step was triggered by completion of the prior step. See Section 107(d)(1)-(2), 42 U.S.C. 7407(d)(1)-(2), and Pub. L. No. 95-95, Section 129(c), 91 Stat. 750, 42 U.S.C. (Supp. I) 7502 note. The first step in the process—identification and designation of nonattainment areas—needed to be completed quickly so that the states would have the maximum opportunity to accomplish the more complicated and lengthy second step—the development and adoption of revised implementation plans, which under the statute were required to be submitted by January 1, 1979. Section 129(c) of Pub. L. No. 95-95, 91

[4]This question is also pending in cases before the District of Columbia and Sixth Circuits. See *State of New Jersey* v. *EPA*, No. 78-1392 (D.C. Cir.), and *Columbus & Southern Ohio Electric Company* v. *Costle*, No. 78-3197 (6th Cir.), and related cases.

Stat. 750, 42 U.S.C. 7502 note. The Administrator assessed the need to adhere to the statutory deadlines and the importance of avoiding any further postponements in attaining the air quality standards, and on that basis he determined that there was good cause to make the nonattainment designations immediately effective without the delay that would be entailed by advance notice and comment (Pet. App. A23). However, in order to obtain the views of the public, the Administrator requested the submission of comments for 60 days following promulgation of the designations (*ibid.*). This procedure ensured that necessary changes in the original designations could be made before the states completed the plan revisions. It also assured that changes could be made before new pollution restrictions were imposed on any source.

Under the 1977 amendments, there is no longer any need to promulgate additional nonattainment designations that would be immediately effective; the critical time period covered by these statutory provisions has passed. Of course, in accordance with the definition set out in Section 171(2), 42 U.S.C. 7501(2), EPA continues to revise its nonattainment designations on the basis of changed circumstances and new information. However, these re-designations are not subject to the stringent deadlines of Sections 107(d)(1)-(2), and are promulgated after prior notice and opportunity for public comment.[5] In short, the unique statutory circumstances that created the practical need to promulgate the original designations without prior notice and comment no longer exist, and the issue presented in the petition will not recur.

[5]Proposed designations and the agency's review of comments and final action are now routinely published. See 44 Fed. Reg. 2617 and 24845 (1979); 44 Fed. Reg. 15743 and 53081 (1979); 44 Fed. Reg. 19212 and 53081 (1979); 44 Fed. Reg. 19213 and 41782 (1979).

Moreover, this is not a situation in which a conflict in the circuits poses problems of inconsistent compliance obligations for petitioners.[6] The nonattainment designations and consequent pollution restrictions are set in each state rather than on a regional or national basis. That the nonattainment designations are made in some states after notice and public comment, while in other states the designations are made immediately effective subject to subsequent public comment, does not raise for petitioners the risk of inconsistent legal requirements that usually results from a conflict in the circuits.[7]

Given that the pertinent statutory periods have now passed and that petitioners are not subject to divergent compliance responsibilities, we submit that review by this Court is unwarranted.[8]

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[6]We note that the relief afforded by the Third Circuit was limited to the two companies involved in that proceeding (Pet. App. A83-A84) and therefore does not affect petitioners.

[7]Any burden resulting from the conflict in the circuits falls upon the EPA, which did not petition for a writ of certiorari in either the Third or the Fifth Circuit cases.

[8]Petitioners also argue that the Seventh Circuit's decision is "clearly erroneous" (Pet. 17). Their claim apparently rests on the mere fact that the Seventh Circuit found good cause while the Third and Fifth Circuits did not. That does not establish either that the Seventh Circuit did not properly review EPA's actions or that the court's decision is clearly erroneous. On the contrary, the Seventh Circuit fully reviewed all of the factors considered by the agency in reaching the decision to make the designations immediately effective (Pet. App. A2-A12). The Seventh Circuit also reviewed the changes in the designations made by EPA in response to public comments, and found that the agency was "clearly willing to consider, fully and objectively, all comments" (*id.* at A15). Accordingly, the Seventh Circuit concluded that there was "no reason to believe" (*ibid.*) that prior notice and comment would have altered the result. In contrast, neither the Third nor the Fifth Circuits weighed all the factors before

2. After sustaining the Administrator's determination that good cause existed under the EPA to dispense with prior notice and public comment, the Seventh Circuit went on to observe (Pet. App. A12-A15) that in any event the technical deviation from APA procedures alleged by petitioners would not be sufficient, under the judicial review provisions of Section 307(d)(9) of the Clean Air Act, 42 U.S.C. 7607(d)(9), to reverse the Administrator's nonattainment designations. Petitioners contend (Pet. 13) that "[t]he decision of the Seventh Circuit regarding the applicability of 42 U.S.C. 7607(d)(9) causes uncertainty in pending and future [EPA] rulemaking * * *." However, the Seventh Circuit's discussion on the proper interpretation of Section 307(d)(9) was clearly dicta, since the court had previously found that there was good cause under the APA for the Administrator's action, and hence the outcome of the case was not affected by the Seventh Circuit's observations in this regard. Moreover, neither the Third nor the Fifth Circuits had considered the applicability of Section 307(d)(9) (Pet. App. A15 n.14), and therefore no conflict among the circuits is presented.

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the Administrator. For example, they failed to recognize that EPA reviewed or made 1300 county nonattainment designations (*id.* at A30) and modified over 300 designations proposed by the states (43 Fed. Reg. 8962-9057 (1978)). Such considerations clearly undermine the Third Circuit's conclusion that "the state's submission was likely to constitute the final rule" (Pet. App. A81) and that therefore EPA could have received prior public comments without disregarding the deadlines imposed by the 1977 amendments. The Third and Fifth Circuits also ignored the delay caused by late state submissions (*id.* at A9). The Seventh Circuit, after careful consideration of the earlier opinions, declined to follow the decisions of the Third and Fifth Circuits. As the latest and most complete analysis of the issue, the Seventh Circuit's decision represents, we submit, the correct resolution.

There will be time enough after the courts of appeals have construed Section 307(d)(9) for this Court to consider the issue in a case in which it is squarely and directly raised.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

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[9]We note that this issue was not briefed or argued by the parties in the court below (Pet. 7).

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